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CITATIONS TO OPINIONS BELOW.

The Opinion of the District Court and the Order Dismissing in the case of Tawanda R. Simmons is unreported and is printed in Appendix "A," hereto, infra, App. A pp. 23-31.

The Opinion of the District Court and the Order Dismissing in the case of Sandra Lee Simmons Shaw is unreported and is printed in Appendix "A," hereto infra, App. A, pp. 32-41.

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit in the consolidated appeals affirming the Orders of the District Court was entered July 7, 1970, and said Opinion appears in the certified Record on Petition for Writ of Certiorari and is printed in Appendix "B," hereto, infra, App. B, pp. 42-45. Said Opinion is reported.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on July 7, 1970, App. B, infra, pp. 42-45. The Jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

STATUTES INVOLVED.

The Statutes involved are the Securities Act of 1933, 15 U.S.C.A., Section 77a, et seq. and the Securities Exchange Act of 1934, 15 U.S.C.A., Section 78a, et seq., and the Rules and Regulations of the Securities and Exchange Commission issued thereunder. The specific sections relied on are printed in Appendix "C," infra, App. C, pp. 45-53.

STATUTES.

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QUESTIONS PRESENTED.

I. Did the Court improperly affirm the dismissal of the actions for lack of jurisdiction in holding that only a purchaser or seller is entitled to maintain a civil action under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules of the Securities and Exchange Commission, where petitioner-stockholders have alleged fraudulent manipulations of the corporation's subsidiaries by respondents and a fraudulent conspiracy by respondents to commit acts which violated the above statutes and the Rule of the Commission, all of which brought about a fraud on petitioners as investors and changed their position to their damage?

II. Did the Court improperly affirm the dismissal of the actions for lack of jurisdiction in holding that petitioners had no personal remedy but only a remedy through a derivative action, where petitioners have alleged that the respondent directors are in control of the corporation, have violated various provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Rules thereunder, and that it would be futile to seek to have the directors take action, and where as alleged here, the respondent directors and officers and their families were controlling shareholders so that a recovery in a derivative action would inure to the benefit of the wrongdoers?

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ————

TAWANDA R. SIMMONS, - - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

SANDRA LEE SIMMONS SHAW, - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Tawanda R. Simmons and Sandra Lee Simmons Shaw, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled consolidated cases on July 7, 1970.

STATEMENT OF THE CASE.

1. Facts.

These consolidated cases were filed as separate actions by the petitioners, Tawanda R. Simmons and Sandra Lee Simmons Shaw, as common shareholders

of Merritt-Chapman & Scott Corporation, against certain of the directors or past directors, and officers or past officers of said corporation and against certain other individuals with whom it is alleged the said directors and officers conspired.

The Complaint in the Simmons case was filed against Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover, Joseph Kosow and Alexander Rittmaster.

The Complaint in the *Shaw* case was filed against the same defendants (respondents) but added two additional persons, Isidore Sherman and Archibald Kleven.

Both Complaints were filed pursuant to the provisions of the Securities Act of 1933 (U.S.C.A., Title 15, Sections 77a, *et seq.*) and the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sections 78a, *et seq.*) and the Rules of the Securities and Exchange Commission.

The Complaints allege that Mrs. Simmons was the owner of 2,600 shares of the common stock of Merritt-Chapman & Scott Corporation and that Mrs. Shaw was the beneficial owner of 1,850 shares of said stock and that they had owned these since 1958 and 1959.

It is alleged that Merritt-Chapman & Scott Corporation was listed on the New York Stock Exchange and that the respondents used the mails and means of interstate commerce to issue and deliver proxies and financial statements which were false and misleading.

The Simmons Complaint alleges that the respondent directors and officers conspired to have Kosow and

others acquire and buy common stock of the corporation and that they secretly guaranteed that the corporation would repurchase said stock at a profit of 20% to 25%. The Shaw Complaint alleges the same facts but includes as defendants (now respondents), Archibald Kleven and Isidore Sherman, as well as Joseph Kosow.

The Complaints also allege that respondents unlawfully effected a series of transactions creating an actual or apparent trading to raise the price on the Exchange and to induce purchases by others and used manipulation and deceptive devices and schemes which operated as a fraud and deceit on the corporation and on petitioners in connection with the purchase of shares by Kosow, Sherman and Kleven, the sale of shares by Kosow, Sherman and Kleven and the purchase of said shares by the corporation.

The Complaints allege that the respondents, as officers and directors, failed to reveal in financial statements and other reports, the secret contract agreements and guarantees and the amounts of profits guaranteed and paid out of the corporation's funds.

It is alleged that defendant (now respondent), Kosow, formed Joint Ventures to buy said stock for resale to the corporation, pursuant to the conspiracy, and that the respondents, who were officers, directors and insiders, failed to reveal such arrangements in various communications sent to petitioners through the mail, and thereby omitted to state material facts necessary to make said statements not misleading, and that said respondents conspired to keep said information

secret, not only from the stockholders but also from the Securities and Exchange Commission.

Petitioners also allege that respondents manipulated the market to assist Kosow and his joint ventures and others, in acquiring stock, in violation of the statutes and rules and to petitioners' damage in the value of their investment and the return thereon.

It is further alleged that respondents conspired to conceal their actions and represented to their auditors that the transactions referred to were arms length transactions, causing the reports and financial statements to be false and misleading.

Further allegations of the Complaints are that respondents caused the corporation to conceal and misrepresent information as to liability of the corporation to purchase the stock at prices above the then market value and as to payment of unreasonable salaries and compensation and as to losses for bad loans in various reports and statements mailed to petitioners, making said communications false and misleading with respect to material facts and depriving petitioners of their right to know the true circumstances of the corporation.

Petitioners further allege that the respondents made untrue statements of material facts and omitted material facts in various reports, proxies, financial reports and communications to petitioners which were delivered by mail, which would keep said reports from being misleading, with the intent and purpose of having the stockholders and petitioners rely thereon.

Petitioners alleged that respondents caused the assets of Devoe and Raynolds Co., Inc., a subsidiary corporation, to be sold to obtain cash to carry out the conspiracy and failed to advise petitioners that said funds would be used to pay excessive profits to persons with whom they conspired. It is alleged that all of these devices, schemes, untrue statements of material facts and omissions of material facts operated as a fraud and deception on petitioners.

It is further alleged in the Complaints that the respondents caused the corporation to acquire Industrial Finance Corporation, Hub Finance and Congress Finance at prices in excess of the fair and reasonable value to benefit the sellers as against the interest of the petitioners. The detailed facts are not pleaded but petitioners will show that after selling the assets of Devoe and Raynolds Co., Inc., the respondents changed the corporate name of Devoe and Raynolds Co., Inc. to Revday, Inc., sold Industrial Finance Corporation, with which respondent, Joseph Kosow, was associated, to Revday, Inc., and then merged it into Merritt-Chapman & Scott Corporation. It is alleged that the cost of this acquisiton was three (3) million dollars *in excess of* the fair price, which was an unjust reward to respondent, Kosow, and deprived petitioners of their interests therein.

Petitioners allege that respondents represented that the corporation was buying its own stock but that the material fact of the conspiracy was that it was being bought at higher prices and at profits to persons with

whom respondents conspired and that by failing to state in their proxies, reports, financial statements and communications these material facts, said respondents made false representations to petitioners. It is alleged that they intentionally left out the material facts and that these false representations were made to induce petitioners and others to rely thereon.

2. Proceedings Below.

These actions were filed by Mrs. Simmons and Mrs. Shaw seeking damages and an accounting on account of respondents' violations of the provisions of the Securities Act of 1933 (U.S.C.A., Title 15, Sections 77a, *et seq.*), the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sections 78a, *et seq.*) and the Rules and Regulations of the Securities and Exchange Commission (Reg. § 240.10b-5, Rule 10b-5).

The various respondents in each of the actions filed Motions to Dismiss and Motions for Change of Venue. The Motions to Dismiss, among other things, were based on respondents' contention that petitioners failed to state a claim under the aforesaid acts because the plaintiff in such an action must be a purchaser or seller of the security involved in reliance upon the alleged manipulative or deceptive device and also their contention that the proper relief is through a derivative action.

After briefs were filed by the parties, the Trial Court sustained the Motions to Dismiss and on October 22, 1969, the Trial Court dismissed the Complaint in

each action (App. A, pp. 23-41). On November 20, 1969, the plaintiff in each action (Petitioners herein) filed a Notice of Appeal to the Sixth Circuit Court of Appeals.

The two actions were consolidated for the purposes of that appeal. They were briefed by the parties and subsequently argued on June 11, 1970, before the Sixth Circuit Court of Appeals.

On July 7, 1970, the Sixth Circuit Court of Appeals by written opinion affirmed the District Court's action in dismissing the suits for lack of jurisdiction (App. B, pp. 42-45). This Petition was then filed.

REASONS FOR GRANTING THE WRIT.

I. Did the Court Improperly Affirm the Dismissal of the Actions For Lack of Jurisdiction in Holding That Only a Purchaser or Seller is Entitled to Maintain a Civil Action Under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules of the Securities and Exchange Commission, Where Petitioner-Stockholders Have Alleged Fraudulent Manipulations of the Corporation's Subsidiaries by Respondents and a Fraudulent Conspiracy by Respondents to Commit Acts Which Violated the Above Statutes and the Rule of the Commission, All of Which Brought About a Fraud on Petitioners as Investors and Changed Their Position to Their Damage?

It is petitioners' contention that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and that the decision is in conflict with applicable decisions of the Supreme Court and is contrary to the holdings of other Courts of Appeal.

There has been much litigation in the district and circuit courts under the Securities Acts but only a few cases have been decided by the Supreme Court. Two cases that have been decided support petitioners' contentions herein.

Under Section 14a, with reference to false materials in solicitation of proxies relating to a proposed merger, the Supreme Court in *J. C. Case Co.* v. *Borak*, 337 U. S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964) held that there is a right of action as to both derivative and *direct* causes. In that decision the Court stated that the Act was for the *protection of investors* and *implies availability of judicial relief where necessary to achieve that result.* The Supreme Court's decision further stated that it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose. Further it is stated that where legal rights have been invaded and federal statutes provide for the general right to sue, the Federal Courts may use any available remedy to make good the wrong.

We think the above case clearly indicates an intention of this Court to protect investors. Petitioners were investors of long standing. The application of the purchase and sale requirement to these actions denies adequate protection to petitioners. As pointed out by the Supreme Court's decision, private enforcement of proxy rules provide a necessary supplement to the action of the Securities and Exchange Commission as civil damage actions are a most effective weapon.

In addition, we believe the principles set out in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U. S. [redacted] (1969) conflict with the Court of Appeals decision in these cases. The Commission took action against National Securities, Inc. to prevent a merger on the basis that there was a violation of Section 10b and Rule 10b-5. National Securities, Inc. controlled National Life and Casualty Co. and is alleged to have purchased a controlling interest in Producers Life Insurance Co. The defendants sought to obtain approval by Producers' stockholders of a merger with National Life. Misrepresentations were made of material facts and certain material facts were omitted according to the Commission's allegations. It is alleged that the shareholders were not told they were going to pay part of the cost of National Securities' acquisition of control of their Company. The Commission was denied temporary relief and a merger took place. The Commission then sought to unwind the merger. A large part of the Court's opinion relates to the effect of the McCarran-Ferguson Act, which has no bearing on the problem relating to the case at bar. However, Section III of the opinion relates to the application of Section 10b and Rule 10b-5. It was contended by the respondents therein that the Complaint failed to allege a "purchase or sale" and that Rule 10b-5 does not apply to misrepresentations in connection with solicitation of proxies.

The Supreme Court's decision stated that the shareholders of Producers Life were misled in various material respects prior to their approval of the merger

and that the deception furthered a scheme which resulted in their losing their status as shareholders of Producers and becoming shareholders in a new company. It is stated that this alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange. The Court states as follows:

> "The broad anti-fraud purposes of the statute and the rule would clearly be furthered by their application to this type of situation. Therefore we conclude that Producers Life's shareholders 'purchased' shares in the new company by exchanging them for their old stock."

That the above decision of the Supreme Court is an extension of or abandonment of the "purchase" or "sale" rule is seen from the dissenting opinion in that case which refers to the Court's decision as adopting a very loose construction of the requirement that a transaction must involve a "purchase" or "sale".

Petitioners herein take the position that they are entitled to maintain these actions even though they are not in the technical position of a seller or purchaser. It is further petitioners' position that the facts show petitioners have had their position changed by the sales and acquisitions carried on by the respondents and that their position has been changed in a similar manner as if there had been an exchange of stock in a merger.

We call the Court's attention to the words of Section 10 of the 1934 Act (Title 15, Section 78j) which reads "in connection with a purchase or sale". It is the position of petitioners that the various actions of

respondents which damaged petitioners' interests were "in connection with purchases" by the Corporation and the "sale" by some of the respondents and other persons of the stock back to the Corporation. We will find as hereinafter set out that issuance of stock by a corporation has been held to be a sale to which these Statutes apply and the natural corollary of this is that a repurchase of shares of stock by a corporation is a "purchase" within these statutes. It should be noted that the last words of Section 10 of the 1934 Act reads: "* * * *for the protection of investors*" so that it can be inferred that present investors as well as purchasers or sellers were intended to be protected.

Various Circuit Courts of Appeal have likewise made decisions the principles of which are contrary to the lower court's decision herein.

In a decision as early as 1951, the Second Circuit, in considering the rights of preferred and common stockholders to bring action based on untrue prospectus and registration statements, where the defendant was alleged to have employed manipulative and deceptive devices to defraud, stated:

> "Congress reasonably, and without inconsistency, allowed suits of that sort which
>
> (1) are free of the restrictions of §11 of 1933 Act, and
>
> (2) which are not confined to those persons who may properly sue under that section but *which include all who are the victims of the fraud.*"
>
> *Fischman* v. *Raytheon Manufacturing Co.*, 188 F. 2d 783 (2nd Cir., 1951). (Emphasis ours.)

The same Circuit in *Ruckle* v. *Roto American Corporation,* 339 F. 2d 24 (2nd Cir., 1964) interpreted Section 10b and Rule 10b-5. There an injunction was sought against the action of the corporation in issuing its own shares of stock. Certain of the directors had failed or refused to disclose fully to the remaining directors material facts concerning the transactions and the financial condition of the company. Certain financial statements had been withheld. The lower court, relying on the case of *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (2nd Cir., 1952) cert. denied 343 U. S. 956, dismissed the Complaint. The Second Circuit reversed the case. The Court held the issuance of its own shares by the corporation was a sale to which the anti-fraud policy expressed in the Federal Security law extends. Petitioners herein contend that their position is the reverse of the Ruckle case in that in the case at bar the repurchase of the corporation's shares by the corporation is a purchase to which the anti-fraud policy of the Federal laws should extend.

The Second Circuit in the case of *Vine* v. *Beneficial Finance Company,* 374 F. 2d 627 (2nd Cir., 1967) interpreted and applied Section 10b and Rule 10b-5. The District Court had dismissed the Complaint and the Circuit Court reversed, holding the plaintiff had an individual federal claim and that plaintiff must be regarded as a "seller".

Plaintiff, Vine, was owner of Class A Common Stock of Crown Finance Company. Vine claimed that Class B stockholders, being the officers and directors of Crown, conspired with Beneficial, whereby Bene-

ficial was enabled to acquire the Class B stock by paying a high price to Class B stockholders and underpaying Class A stockholders. They made a tender to acquire Class A stock and the Court pointed out there was fraud in the purchase of this Class A stock. Having acquired 95% of Class A stock, Beneficial was able to merge Crown into Beneficial without Class A stockholders' voting on it. This was a "short form merger" and plaintiff then had the option of accepting defendant's offer or having the stock appraised. The Court held that thereby plaintiff became a "seller", even though no sale was made. It should be noted that the Securities and Exchange Commission entered the case and expressed the opinion that a plaintiff need not be a "selling" stockholder so long as the Rule has been violated and plaintiff's stock lost value. It cites *Birnbaum, supra; O'Neill* v. *Maytag,* 339 F. 2d 764 (2nd Cir., 1964) and *List* v. *Fashion Park, Inc.,* 340 F. 2d 457 (2nd Cir., 1965) and states that these cases have been too broadly read and can be distinguished. The Court held plaintiff stated an *individual* federal claim.

In the case of *Mutual Shares Co.* v. *Genesco,* 384 F. 2d 540 (2nd Cir., 1967) the plaintiff and two other corporations were owners of stock of the S. H. Kress and Company. It is alleged that the defendants, Genesco and Maxey Jarman, acquired 94% of the stock of Kress pursuant to a fraudulent conspiracy, acquired control of Kress, used Kress property to finance the acquisition, and that defendants manage Kress and appropriate its assets for Genesco's benefit. Plaintiff claimed it was euchred into buying Kress stock and still owned

it. After plaintiff became a shareholder it is further alleged the defendants manipulated the market of Kress stock and kept the dividends down to a minimum.

The lower court held no claim was stated. The Second Circuit allowed plaintiff's claim for an injunction under Rule 10b-5 as to the acts of defendants in manipulation and diversion and in keeping the dividends low to force minority holders to sell. The claim for damages was denied, but for the reason that there was a lack of a causal connection between the acts and any damages to plaintiff. However, we believe this case specifically holds that the fact that plaintiffs have not sold their stock is not controlling.

The Third Circuit Court of Appeals decided the case of *Pappas* v. *Moss,* 393 F. 2d 865 (3rd Cir., 1968), which was a stockholders' derivative action. It was based on the alleged wrongful acts of defendants in connection with the issuance of additional shares of corporate stock and the selling of some of these shares to themselves (insiders) at a price below the fair value. While reversing a lower court's decision allowing recovery based on the directors' purchasing of some of the stock, the Court held that with sufficient proof a violation of Rule 10b-5 may be found. There were fraudulent representations in connection with a resolution authorizing the issuance of the stock. *The Court points out that the deception of the independent stockholders is no less real because "formalistically" the corporate entity was the victim of the fraud.* The defendants relied on *Birnbaum and O'Neill.* The Court states that defendants' interpretation restricts the ap-

plication of the Rule in a way that is at odds with its basic purpose. The Securities and Exchange Commission entered in the case and pointed out that *Vine* and *Brod (A. T. Brod & Co.* v. *Perlow,* 375 F. 2d 393 (2nd Cir., 1967)) have undermined *Birnbaum* and *O'Neill.*

The Fifth Circuit Court of Appeals in the case of *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195 (5th Cir., 1960), held that the issuance of corporate stock constituted a sale. In referring to Rule 10b-5, the Court said this rule is more sweeping:

> "It greatly expands the protection frequently hemmed in by the traditional concepts of common law misrepresentation and deceit, the requirement of privity, proof of specific damage, inadequacy of the right of recession or right to recover up to par value of stock of a much greater value."

The Seventh Circuit Court of Appeals in *Dasho* v. *Susquehanna Corporation,* 380 F. 2d 262 (7th Cir., 1967) reversed the lower court's decision which had dismissed this derivative action. Plaintiff charged a conspiracy to defraud Susquehanna in the sale and purchase of securities in violation of Sections 17a, 10b and Rule 10b-5 and in distributing false proxies. Plaintiff charged that defendants caused Susquehanna to acquire by indirection 435,000 shares of its own stock at a price in excess of its market value. This was to be accomplished by a device of a sale of shares by a particular group of shareholders to Gypsum Company, acting through one of the defendants, Karholz, followed by a merger of Gypsum into Susquehanna. On

the election of officers and directors it was necessary to solicit proxies and in the proxies they did not inform the shareholders of the plan of the group to merge with Gypsum. The merger plan involved a gross overvaluation of Gypsum stock and Susquehanna would have acquired its own stock at $1,740,000 in excess of its fair value. The defendants contended that plaintiff was not a purchaser or seller. The plaintiff contended that the issuance by a corporation of shares to be exchanged for shares or assets of another corporation constituted the issuing corporation either a seller or a purchaser of securities entitled to the protection of the securities laws.

The Court there stated that the purpose of Congress was to make control of security transactions reasonably complete and effective to accomplish the purpose of legislation. It cites *Ruckle, supra,* as authority for the proposition that issuance by a corporation of its own shares is a sale to which the anti-fraud policy extends. The Court held that the acquistion or disposition of securities in exchange for other securities falls within the statutory definition.

We think the Court of Appeals erred in concluding that Petitioners' contention, if allowed, would open the door to federal jurisdiction in claims for damages against corporate directors and officers arising out of breach of their fiduciary duties. This is the same error that the District Court made when it adopted the Opinion as drawn up by Respondents' counsel. Mere fiduciary duties are not involved in these actions. What are involved are violations of the Federal Statutes and

we feel the persons injured or damaged thereby should be protected by the Federal Courts. The respondents violated the criminal provisions of the securities acts and the fraudulent conspiracy is the heart of these actions, not simply violation of a fiduciary duty. It will be shown on proof that the basis of the civil claims herein were excluded from the previous settlement of a derivative action in the Southern District of New York on the basis and for the reason these claims were based on the same facts for which certain of the respondents were being prosecuted in Federal Court in New York.

II. Did the Court Improperly Affirm the Dismissal of the Actions For Lack of Jurisdiction in Holding That Petitioners Had No Personal Remedy But Only a Remedy Through a Derivative Action, Where Petitioners Have Alleged That the Respondent Directors Are in Control of the Corporation, Have Violated Various Provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the Rules Thereunder, and That it Would be Futile to Seek to Have the Directors Take Action, and Where as Alleged Here, the Respondent Directors and Officers and Their Families Were Controlling Shareholders so That a Recovery in a Derivative Action Would Inure to the Benefit of the Wrongdoers?

Petitioners contend that they have a right to bring these actions as individuals and are not restricted to relief in a derivative or class action.

Petitioners alleged that Louis E. Wolfson and his family, and persons and corporations which he con-

trols, dominate and control the corporation, and that a demand on the corporation to bring an action against the respondent wrongdoers would have been futile and useless.

Petitioners also alleged that they bring these actions as individual shareholders because any action on behalf of the other shareholders would insure to the benefit of respondents and particularly, Louis E. Wolfson, to the extent of their stock interest, and such would be futile and unwarranted as they would be profiting from their own wrongs.

As noted above, the case of *J. C. Case Co.* v. *Borak, supra,* held that under Section 14a there is a right of action as to both derivative and *direct* causes. The Court there stated that the Act was for the *protection of investors* and implies availability of judicial relief where necessary to achieve that result.

It is petitioners' position that any remedy for the corporation or for all of the shareholders would be meaningless, as the respondents, some of whom are controlling shareholders, would reap the benefit and would not be required to make petitioners whole. Petitioners have been impressed with this fact by their experience in the derivative actions filed in New York (which actions excluded the facts relied on in the present cases) against some of the same persons where the Court approved a settlement which benefitted only the defendants and the attorneys and meant nothing to the value of petitioners' interest in the corporation.

Petitioners further feel, as pointed out to the Court below, that since the proof will show that Merritt,

Chapman & Scott Corporation is in liquidation, there is all the more reason to grant petitioners the individual relief sought herein.

The Ninth Circuit Court of Appeals decided the case of *Matheson* v. *Armbrust*, 284 F. 2d 670 (9th Cir., 1960), which was an action by Armbrust to cancel a contract and for damages on account of defendant Matheson's scheme to defraud in connection with the stock of Hauling Company. There it was alleged the defendant, Matheson, made gross misstatements as to the financial condition of the corporation. It was held that the Court had jurisdiction and the *private civil remedy* was approved.

Although different on its facts, *Stevens* v. *Vowell*, 343 F. 2d 374 (10th Cir., 1965), was an action under Section 10b and Rule 10b-5 to recover funds invested in a corporation. It was a suit by an individual and the Court allowed the individual action.

The Second Circuit Court decided the case of *Vine* v. *Beneficial Finance Company, supra.* While it is not clear from the opinion what type of actions were set up it does appear that Vine, the plaintiff, was an individual Class A stockholder. It appears that Vine sought damages to be paid pro-rata to Class A stockholders who did not participate in wrongdoing. The Court held that Vine had an individual federal claim under Section 10b and Rule 10b-5. We do not see any reason why petitioners, in the cases at bar, should not be permitted to assert their individual rights. *Vine* was cited with approval in the Supreme Court decision

of *Securities and Exchange Commission* v. *National Securities, Inc., supra.* The Court in the *Vine* case recognized the meaninglessness of a derivative suit on behalf of Crown Corporation, a corporation swallowed up by a subsidiary of the defendant wrongdoer. Petitioners in the cases at bar are of the opinion that a derivative action would be meaningless in the circumstances, particularly where the Merritt corporation is now in liquidation.

Another Second Circuit opinion is that of *Mutual Shares Corp.* v. *Genesco, supra,* which involved an action by Mutual Shares Corp. and two other corporations, all three of which were shareholders, alleging violation of the Securities Acts. There the claim for damages was denied because of lack of causal connection, not because it was a suit by a particular shareholder. This case is in accordance with petitioners' contention that they may maintain the actions individually. The dissenting opinion points out specifically that it is not a class action and that plaintiff seeks to be paid the fair value of its pro-rata shares of the uses of the business, assets and credit of S. H. Kress and Company wrongfully made by defendants, and that the plaintiff therein is a present shareholder.

CONCLUSION.

Petitioners urge the Court to consider thoroughly their contentions that as investors they should be protected by the Federal Statutes and that the change in their position as shareholders resulting from the manipulations of the stock of Merritt-Chapman & Scott Corporation and the buying and selling of said stock and the sale and mergers of subsidiary corporations as set forth above, which were a part of the conspiracy alleged, places them in a changed position just as much as the shareholders in Producers Life were misled and changed their position as set out in *Securities and Exchange Commission* v. *National Securities, Inc., supra.*

It is submitted that under the decisions referred to, the rule relied on by the respondents and the Court of Appeals that it is necessary for a plaintiff to be a purchaser or seller has eroded and should not be held applicable in a situation of this kind.

While petitioners did not lose their status as shareholders, they certainly changed their position by reason of respondents' conduct in pouring out the assets of the corporation to purchase stock at prices that paid Kosow, Kleven and others a considerable profit not offered petitioners. There seems to be little real difference whether they were bilked in an actual sale or merger or bilked by reduction in value of their stock. In the words of the Supreme Court in *Securities and Exchange Commission* v. *National Securities, Inc., supra,* "here an alleged deception has affected individual shareholder's decisions in ways not at all unlike

that involved in a typical cash sale or share exchange." While it was the same company name, it was a different company in substance after respondents' manipulations and purchases and sales, and petitioners' positions have changed and they were injured thereby. Petitioners request that this Petition be granted in order that the law on the questions presented can be clarified for the public, in order that persons dealing in stocks can be told that they cannot violate these laws and take advantage of those shareholders who are not in a position to know the facts, without being liable for damages to other shareholders, and in order that these petitioners may have an opportunity for justice through a jury trial of their claims.

Respectfully submitted,

JOHN G. HICKS,
716 Louisville Trust Building,
Louisville, Kentucky 40202,
Attorney for Petitioners.

APPENDIX

APPENDIX "A."

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 6095

Tawanda Simmons, - - - - - - Plaintiff,

v.

Louis E. Wolfson, Et Al., - - - Defendants.

OPINION.

This cause comes on before the Court on the defendants' motion to dismiss the plaintiff's Complaint as amended.

The plaintiff is the holder of 2,600 shares of common stock of the Merritt-Chapman & Scott Corporation (hereinafter referred to as "corporation"), having acquired said shares prior to the year 1959 and being the holder of these same shares at the time this action was brought. At all times herein involved, the common stock of the corporation was traded on the New York Stock Exchange. The plaintiff brings this action as an individual shareholder of the corporation, not in a representative capacity nor as a stockholder's derivative action.

The defendants are certain directors and officers of the corporation, and one other person not a director or officer of the corporation, all of whom the Complaint alleges conspired and acted to bring about the worngs which are the subject of the Complaint.

The Complaint alleges that the defendants made secret agreements whereby the non-director defendant purchased

large numbers of shares of the stock of the corporation and sold these shares to the corporation at great profit to himself and the other defendants and expense to the corporation, after the defendants had manipulated the stock market so that the market value of the stock when purchased by the corporation was substantially above its true value. Thus, the plaintiff alleges that the defendants, who controlled the corporation, conspired to defraud the corporation through manipulation of the stock market and by causing the corporation to purchase its own stock at prices which the defendants knew to be above the true value of the stock. The Complaint also alleges that the directors caused the corporation to engage in a number of transactions not in the best interest of the corporation in order that above-mentioned stock purchases might be made. Finally, the plaintiff maintains that the defendant directors failed to disclose their conspiracy and continued wrongdoing in the various proxies, reports and financial statements sent by the corporation to the plaintiff. The Complaint alleges that this fraudulent activity took place between 1961 and 1964.

The plaintiff maintains that this Court has jurisdiction because the facts alleged state a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934 and because the plaintiff is a proper party to recover for such violations. The plaintiff maintains that she has stated a cause of action under Section 17(a) of the Securities Act of 1934 (15 U.S.C. § 77(q)) and Sections 9 (15 U.S.C. § 78(i)), Section 10b (15 U.S.C. § 78(j)), Section 14(a) (15 U.S.C. § 78(n)), Section 18 (15 U.S.C. § 78(r)), and Section 20 (15 U.S.C. § 78(t)) of the Securities Exchange Act of 1934.

Jurisdiction of this Court over the subject matter and the parties to this action rests in the special jurisdiction provisions of the Securities Act and the Securities Ex-

change Act. 15 U.S.C. § 77(u) and 15 U.S.C. § 78(aa). Unless a cause of action is stated under the Securities Acts and the Securities Exchange Act this Court does not have jurisdiction because none of the defendants are residents, nor have they been served with process within the territorial limits of this Court's jurisdiction.

Claim Under Section 17(a) of the 1933 Securities Act.

Section 17(a) makes it unlawful to employ certain fraudulent acts in the "offer or sale of any securities. . . ." Only a person who purchased a security in reliance upon some fraudulent act of a seller has a standing to maintain a complaint under Section 17(a). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783, 790 (8th Cir. 1967). Plaintiff does not allege that there was any fraud when she purchased stock in the corporation, but that the corporation was defrauded by its own directors when it purchased its own stock. The plaintiff is not a purchaser within the meaning of Section 17(a) and does not have standing to maintain an individual action when the facts alleged show the corporation to be the party defrauded. The complaint states no cause of action under Section 17(a).

Claim Under Section 9 of the 1934 Securities Exchange Act.

Plaintiff's allegations relating to Section 9 are essentially that the defendants manipulated the stock market in violation of Section 9 and then caused the corporation to purchase the over-valued stock. Section 9 provides civil relief to "any person who shall purchase or sell any security at a price which was affected by such act or transaction." While the Complaint may allege a manipulation in violation of Section 9, it fails to allege that the plaintiff was a person who purchased or sold a security at a price

affected by such manipulation. Because the plaintiff was neither a purchaser or seller of stock at a price affected by the alleged manipulation, the Complaint states no cause of action under Section 9.

Even if the Complaint did state a cause of action under Section 9, a claim under that Section would be barred by the applicable statute of limitations. Section 9(e) provides that actions to enforce a liability under Section 9 must be brought within three years after such violation. According to the allegations contained in the Complaint the violations alleged took place no later than 1964. This action was commenced December 5, 1968. A Complaint which on its face shows it is subject to a limitations bar is subject to a motion to dismiss. *Vanderboom* v. *Sexton,* 294 F. Supp. 1178 (W.D. Ark. 1969). Further, in order to state a cause of action where limitations of the type here involved are present, the Complaint must show that the action is brought within the applicable limitations period. *Rosenberg* v. *Hanna & Co.,* 26 F. Supp. 160 (E.D. Pa. 1938). *Chambliss* v. *Coca-Cola Bottling Corporation,* 274 F. Supp. 401, 408, (E.D. Tenn., 1967).

Claim Under Section 10(b) of the 1934 Securities Exchange Act.

Plaintiff's claim under Section 10(b) is met with the same problem which faces her claim under other sections of the Securities Acts. The question is whether a person not a purchaser or seller of a security may have relief under Section 10(b). Plaintiff argues that, although she is not a purchaser or seller, she is thrust into the position of purchaser occupied by the corporation in which she holds stock because the directors of the corporation have breached their duty to the corporation. For situations such as are involved herein, plaintiff maintains that the purchase and sale rule has been abandoned.

There is no question today that Section 10(b) provides civil relief under certain circumstances. However, just as the Courts have allowed civil recovery under Section 10(b), so too have they limited recovery under this Section to purchasers and sellers. *Greenstein* v. *Paul,* 400 F. 2d 580 (2nd Cir. 1968). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (8th Cir. 1967). *Studebaker Corporation* v. *Allied Products Corporation,* 256 F. Supp. 173 (W.D. Mich. 1966).

The Securities Acts were written to prevent fraud in the securities market place. They were not intended to provide a new cause of action for every breach of fiduciary duty on the part of a director of a corporation.

This Court rejects the contention that the purchase and sale rule has been abandoned under Section 10(b) or any other section of the Securities Acts herein involved. Recent decisions in the Supreme Court and the Court of Appeals for the Sixth Circuit affirm the continued existence of the rule. Although these decisions have extended the term purchase and sale to include situations where other types of exchange of stock have taken place, the right of recovery is still limited to that person who is a party to the exchange. *Securities and Exchange Commission* v. *National Securities,* 393 U.S. 453 (1969). *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968), cert. denied, 37 U.S.L. Week 3355 (March 24, 1969).

If a corporation is to be recognized as a distinct legal entity then it is the corporation that is damaged as a result of its purchase of fraudulently over-priced stock. Granted, any injury to the corporation is an indirect injury to each stockholder, but this does not change the fact that injury to the corporation results in a right of action to the corporation, not its stockholders. There is no provision in the Securities Acts which changes this fundamental legal concept.

The plaintiff has failed to state a cause of action under Section 10(b) because the Complaint does not show the plaintiff to be a purchaser or seller of securities in reliance on the fraud alleged.

Claim Under Section 14(a) of the Securities Exchange Act.

Plaintiff's claim under Section 14(a) is that in the various reports, proxies and financial statements sent the plaintiff by the corporation the alleged fraudulent scheme of the defendants was not disclosed. The Complaint does not point to any particular proxy or statement, nor is there any allegation that the omissions resulted in any adverse corporate action which would not have been taken otherwise. The plaintiff argues that the defendants had a duty to report to each stockholder the fact that the defendants were defrauding the company, and failure to so report results in a violation of Section 14(a).

Nothing in the Securities Exchange Act of 1934 or the regulations thereunder requires that directors' breaches of fiduciary duties be revealed in proxy statements. *Robbins* v. *Banner Industries, Inc.*, 285 F. Supp. 758 (S.D.N.Y. 1966). The allegation that false or misleading statements appeared in a proxy statement is not enought to create a cause of action under Section 14. In the absence of some allegation of infringement upon corporate sufferage rights or some corporate action taken as a result of such infringement, no cause of action under Section 14 can be made. Even if there were material misstatements or material omissions of fact, it must be alleged that the corporation took adverse action because of the statements. It must be alleged that the transaction under attack resulted from the misleading proxy statement. *Hoover* v. *Allen*, 241 F. Supp. 213, 230 (S.D.N.Y. 1965). *Boundbrook Water Company* v. *Jaffe*,

284 F. Supp. 702 (D.N.J. 1968). *Kiminsky* v. *Abrams*, 281 F. Supp. 501 (S.D.N.J. 1968).

The plaintiff's general allegation of failure to disclose the breach of fiduciary duty is not sufficient to state a cause of action under Section 14.

Claim Under Section 18 of the 1934 Act.

Plaintiff argues that she has stated a cause of action under Section 18 of the Securities Exchange Act of 1934. Section 18 contains a general proscription against false or misleading statements in any documents required to be filed by the Securities Acts or regulations thereunder, and provides civil relief to anyone damaged through the purchase or sale of a security in reliance on such a statement. The Complaint does not allege that there was any false application, report or document filed pursuant to the 1934 Act. Nor does the plaintiff allege that she purchased or sold a security at a price that was affected by such statement. Therefore, plaintiff does not state a cause of action under this Section.

Claim Under Section 20 of the 1934 Act.

Section 20 of the Securities Exchange Act provides that a controlling person may be jointly and severally liable with a controlled person when the controlled person violates provisions of the Act. Because plaintiff has failed to state a cause of action against any of the defendants, or anyone else, there can be no liability on the part of persons alleged to be controlling them. No cause of action is stated under Section 20.

The heart of the plaintiff's claim is that the controlling directors of the corporation breached their fiduciary duty to the corporation and caused the corporation to purchase its own stock at an excessive price, all to the profit of the

defendants. If, as the plaintiff charges, the directors did act to defraud the corporation, the correct remedy is through a derivative action. If there were violations of the Securities Acts, the corporation may also recover for those violations. The Securities Acts were intended to prevent fraud in the securities market place, and to protect those who are misled by said fraud in the acquisition and disposition of securities. The facts alleged in the plaintiff's Complaint show clearly that while the corporation may have a right of action under the Securities Acts, the plaintiff does not.

Defendants' Motion to Dismiss is sustained and the plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

October 22, 1969.

(s) Henry L. Brooks,
United States District Judge.

For the Plaintiff:

John G. Hicks, Esq.
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For the Defendants:

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Randolph A. Brown, Esq.
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S. Tilford Payne, Esq.
Kentucky Home Life Building
Louisville, Kentucky 40202

ORDER DISMISSING.

The defendants' motion to dismiss herein having been sustained by order dated September 4, 1969.

It Is Ordered and Adjudged that the plaintiff, Tawanda Simmons, take nothing, that this action is hereby dismissd with prejudice, and that the defendants, Wolfson, Gerbert, Staub, Baker, Hoover, Kosow, and the co-executors of the Estate of Alexander Rittmaster, recover of the plaintiff, Tawanda Simmons, their costs of this action.

(s) Henry L. Brooks,
United States District Judge.

Dated: 10-22-69

cc. John G. Hicks, Esq.
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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 6258

Sandra Lee Simmons Shaw, - - - Plaintiff,

v.

Louis E. Wolfson, Et Al., - - - Defendants.

OPINION.

This cause comes on before the Court on the defendants' motion to dismiss the plaintiff's Complaint as amended.

The plaintiff is the holder of 1,850 shares of common stock of the Merritt-Chapman & Scott Corporation (hereinafter referred to as "corporation"), having acquired 2050 shares of the corporation prior to the year 1960 and being the holder of all but 200 of these shares at the time this action was brought. The 200 shares sold were sold in 1960 and 1961. There is no contention by the plaintiff that any cause of action arises from the selling of these 200 shares. At all times herein involved, the common stock of the corporation was traded on the New York Stock Exchange. The plaintiff brings this action as an individual shareholder of the corporation, not in a representative capacity nor as a stockholder's derivative action.

The defendants are certain directors and officers of the corporation, and three other persons not directors or officers of the corporation, all of whom the Complaint alleges conspired and acted to bring about the wrongs which are the subject of the Complaint.

The Complaint alleges that the defendants made secret agreements whereby the non-director defendants purchased large numbers of shares of the stock of the corporation and sold these shares to the corporation at great profit to themselves and the other director and officer defendants and expense to the corporation, after the defendants had manipulated the stock market so that the market value of the stock when purchased by the corporation was substantially above its true value. Thus, the plaintiff alleges that the defendants, who controlled the corporation, conspired to defraud the corporation through manipulation of the stock market and by causing the corporation to purchase its own stock at prices which the defendants knew to be above the true value of the stock. The Complaint also alleges that the directors caused the corporation to engage in a number of transactions not in the best interest of the corporation in order that above-mentioned stock purchases might be made. Finally, the plaintiff maintains that the defendant directors failed to disclose their conspiracy and continued wrong-doing in the various proxies, reports and financial statements sent by the corporation to the plaintiff. The Complaint alleges that this fraudulent activity took place between 1961 and 1964.

The plaintiff maintains that this Court has jurisdiction because the facts alleged state a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934 and because the plaintiff is a proper party to recover for such violations. The plaintiff maintains that she has stated a cause of action under Section 17(a) of the Securities Act of 1934 (15 U.S.C. § 77(q)) and Section 9 (15 U.S.C. § 78(i)), Section 10b (15 U.S.C. § 78(j)), Section 14(a) (15 U.S.C. § 78(n)), Section 18 (15 U.S.C. § 78 (j)), Section 14(a) (15 U.S.C. § 78(n)), Section 18 (15

U.S.C. § 78(r)), and Section 20 (15 U.S.C. § 78(t)) of the Securities Exchange Act of 1934.

Jurisdiction of this Court over the subject matter and the parties to this action rests in the special jurisdiction provisions of the Securities Act and the Securities Exchange Act. 15 U.S.C. § 77(u) and 15 U.S.C. § 78(aa). Unless a cause of action is stated under the Securities Acts and the Securities Exchange Act this Court does not have jurisdiction because none of the defendants are residents, nor have they been served with process within the territorial limits of this Court's jurisdiction.

Claim Under Section 17(a) of the 1933 Securities Act.

Section 17(a) makes it unlawful to employ certain fraudulent acts in the "offer or sale of any securities. . . ." Only a person who purchased a security in reliance upon some fraudulent act of a seller has a standing to maintain a complaint under Section 17(a). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783, 790 (8th Cir. 1967). Plaintiff does not allege that there was any fraud when she purchased stock in the corporation, but that the corporation was defrauded by its own directors when it purchased its own stock. The plaintiff is not a purchaser within the meaning of Section 17(a) and does not have standing to maintain an individual action when the facts alleged show the corporation to be the party defrauded. The Complaint states no cause of action under Section 17(a).

Claim Under Section 9 of the 1934 Securities Exchange Act.

Plaintiff's allegations relating to Section 9 are essentially that the defendants manipulated the stock market in violation of Section 9 and then caused the corporation to purchase the over-valued stock. Section 9 provides civil

relief to "any person who shall purchase or sell any security at a price which was affected by such act or transaction." While the Complaint may allege a manipulation in violation of Section 9, it fails to allege that the plaintiff was a person who purchased or sold a security at a price affected by such manipulation. Because the plaintiff was neither a purchaser or seller of stock at a price affected by the alleged manipulation, the Complaint states no cause of action under Section 9.

Even if the Complaint did state a cause of action under Section 9, a claim under that Section would be barred by the applicable statute of limitations. Section 9(e) provides that actions to enforce a liability under Section 9 must be brought within three years after such violation. According to the allegations contained in the Complaint the violations alleged took place no later than 1964. This action was commenced June 16, 1969. A Complaint which on its face shows it is subject to a limitations bar is subject to a motion to dismiss. *Vanderboom* v. *Sexton,* 294 F. Supp. 1178 (W.D. Ark. 1969). Further, in order to state a cause of action where limitations of the type here involved are present, the Complaint must show that the action is brought within the applicable limitations period. *Rosenberg* v. *Hanna & Co.,* 26 F. Supp. 160 (E.D. Pa. 1938). *Chambliss* v. *Coca-Cola Bottling Corporation,* 274 F. Supp. 401, 408 (E. D. Tenn., 1967).

Claim Under Section 10(b) of the 1934 Securities Exchange Act.

Plaintiff's claim under Section 10(b) is met with the same problem which faces her claim under other sections of the Securities Acts. The question is whether a person not a purchaser or seller of a security may have relief under Section 10(b). Plaintiff argues that, although she is not a

purchaser or seller, she is thrust into the position of purchaser occupied by the corporation in which she holds stock because the directors of the corporation have breached their duty to the corporation. For situations such as are involved herein, plaintiff maintains that the purchase and sale rule has been abandoned.

There is no question today that Section 10(b) provides civil relief under certain circumstances. However, just as the Courts have allowed civil recovery under Section 10(b), so too have they limited recovery under this Section to purchasers and sellers. *Greenstein* v. *Paul,* 400 F. 2d 580 (2nd Cir. 1968). *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (8th Cir. 1967). *Studebaker Corporation* v. *Allied Products Corporation,* 256 F. Supp. 173 (W.D. Mich. 1966).

The Securities Act were written to prevent fraud in the securities market place. They were not intended to provide a new cause of action for every breach of fiduciary duty on the part of a director of a corporation.

This Court rejects the contention that the purchase and sale rule has been abandoned under Section 10(b) or any other section of the Securities Acts herein involved. Recent decisions in the Supreme Court and the Court of Appeals for the Sixth Circuit affirm the continued existence of the rule. Although these decisions have extended the term purchase and sale to include situations where other types of exchange of stock have taken place, the right of recovery is still limited to that person who is a party to the exchange. *Securities and Exchange Commission* v. *National Securities,* 393 U. S. 453 (1969). *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968), cert. denied, 37 U.S.L. Week 3355 (March 24, 1969).

If a corporation is to be recognized as a distinct legal entity then it is the corporation that is damaged as a result of its purchase of fraudulently over-priced stock.

Granted, any injury to the corporation is an indirect injury to each stockholder, but this does not change the fact that injury to the corporation results in a right of action to the corporation, not its stockholders. There is no provision in the Securities Acts which changes this fundamental legal concept.

The plaintiff has failed to state a cause of action under Section 10(b) because the Complaint does not show the plaintiff to be a purchaser or seller of securities in reliance on the fraud alleged.

Claim Under Section 14(a) of the Securities Exchange Act.

Plaintiff's claim under Section 14(a) is that in the various reports, proxies and financial statements sent the plaintiff by the corporation the alleged fraudulent scheme of the defendants was not disclosed. The Complaint does not point to any particular proxy or statement, nor is there any allegation that the omission resulted in any adverse corporate action which would not have been taken otherwise. The plaintiff argues that the defendants had a duty to report to each stockholder the fact that the defendants were defrauding the company, and failure to so report results in a violation of Section 14(a).

Nothing in the Securities Exchange Act of 1934 or the regulations thereunder requires that directors' breaches of fiduciary duties be revealed in proxy statements. *Robbins* v. *Banner Industries, Inc.*, 285 F. Supp. 758 (S.D.N.Y. 1966). The allegation that false or misleading statements appeared in a proxy statement is not enough to create a cause of action under Section 14. In the absence of some allegation of infringement upon corporate sufferage rights or some corporate action taken as a result of such infringement, no cause of action under Section 14 can be

made. Even if there were material misstatements or material omissions of fact, it must be alleged that the corporation took adverse action because of the statements. It must be alleged that the transaction under attack resulted from the misleading proxy statement. *Hoover* v. *Allen,* 241 F. Supp. 213, 230 (S.D.N.Y. 1965). *Boundbrook Water Company* v. *Jaffe,* 284 F. Supp. 702 (D.N.J. 1968). *Kiminsky* v. *Abrams,* 281 F. Supp. 501 (S.D.N.J. 1968).

The plaintiff's general allegation of failure to disclose the breach of fiduciary duty is not sufficient to state a cause of action under Section 14.

Claim Under Section 18 of the 1934 Act.

Plaintiff argues that she has stated a cause of action under Section 18 of the Securities Exchange Act of 1934. Section 18 contains a general proscription against false or misleading statements in any documents required to be filed by the Securities Acts or regulations thereunder, and provides civil relief to anyone damaged through the purchase or sale of a security in reliance on such a statement. The Complaint does not allege that there was any false application, report or document filed pursuant to the 1934 Act. Nor does plaintiff allege that she purchased or sold a security at a price that was affected by such statement. Therefore, plaintiff does not state a cause of action under this Section.

Claim Under Section 20 of the 1934 Act.

Section 20 of the Securities Exchange Act provides that a controlling person may be jointly and severally liable with a controlled person when the controlled person violates provisions of the Act. Because plaintiff has failed to state a cause of action against any of the defendants, or

anyone else, there can be no liability on the part of persons alleged to be controlling them. No cause of action is stated under Section 20.

The heart of the plaintiff's claim is that the controlling directors of the corporation breached their fiduciary duty to the corporation and caused the corporation to purchase its own stock at an excessive price, all to the profit of the defendants. If, as the plaintiff charges, the directors did act to defraud the corporation, the correct remedy is through a derivative action. If there were violations of the Securities Acts, the corporation may also recover for those violations. The Securities Acts were intended to prevent fraud in the securities market place, and to protect those who are misled by said fraud in the acquisition and disposition of securities. The facts alleged in the plaintiff's Complaint show clearly that while the corporation may have a right of action under the Securities Acts, the plaintiff does not.

Defendants' Motion to Dismiss is sustained and the plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

October, 22, 1969.

(s) Henry L. Brooks,
United States District Judge.

For the Plaintiff:

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Irwin G. Waterman, Esq.
600 Marion E. Taylor Building
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ORDER DISMISSING.

The defendants' motion to dismiss herein having been sustained by order dated September 4, 1969.

It Is Ordered and Adjudged that the plaintiff, Sandra Lee Simmons Shaw, take nothing, that this action is hereby dismissed with prejudice, and that the defendants, Wolfson, Gerbert, Staub, Baker. Hoover, Kosow, Sherman, Kleven, and the co-executors of the Estate of Alexander Rittmaster, recover of the plaintiff, Sandra Lee Simmons Shaw, their costs of this action.

(s) Henry L. Brooks,
United States District Judge.

Dated: 10-22-69.

cc: John G. Hicks, Esq.
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"APPENDIX B."

Nos. 20090-091

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20,090

Twanda R. Simmons, - - - Plaintiff-Appellant,

v.

Louis E. Wolfson, Et Al., - Defendants-Appellees.

No. 20,091

Sandra Lee Simmons Shaw, - Plaintiff-Appellant,

v

Louis E. Wolfson, Et Al., - Defendants-Appellees.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

Decided and Filed July 7, 1970.

Before PHILLIPS, Chief Judge, WEICK and PECK, Circuit Judges.

PER CURIAM. In these consolidated appeals appellants ask us to reverse orders of the District Court granting motions to dismiss their complaints as amended for lack of jurisdiction.

Appellants were owners of shares of common stock in Merritt-Chapman & Scott Corporation, a corporation whose shares were registered and listed on the New York Stock Exchange. Appellants instituted separate, identical actions in the District Court under the provisions of the Securities Act of 1933 (15 U.S.C. §§ 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a et seq.), and Rule 10b-5 of the Securities and Exchange Commission. In these actions appellants asserted a claim for damages against the officers and directors of the corporation and others, for impairment of the value of their shares of stock resulting from an alleged fraudulent conspiracy of the defendants to commit acts which violated the above statutes and rules of the Commision. These acts included alleged secret agreements whereby certain defendants (not officers or directors of the corporation) purchased large numbers of shares of stock of the corporation and sold the shares to the corporation at great profit to themselves and the other defendants, after manipulating the stock market so that the market value of the stock when it was purchased by the corporation was in excess of its true value; that the officers and directors of the corporation engaged in a number of other fraudulent transactions; that these transactions resulted in substantial losses to the corporation; and that said officers and directors issued fraudulent reports and financial statements and concealed their fraudulent practices.

None of the defendants in said actions resided in or was served with process in Kentucky. Jurisdiction of the District Court was based entirely on the Security Act of 1933 and the Security Exchange Act of 1934. The corporation was not made a party to the actions. Appellants sought to recover in their own right and not in a derivative or representative capacity in behalf of the corporation.

It was undisputed that appellants had acquired their shares of stock prior to the time the alleged illegal acts had been committed.

Section 17a of the Securities Act of 1933 makes it unlawful to employ fraudulent acts "in the offer or sale of any securities . . . ." Only purchasers have standing to sue for violations of the 1933 Act. *Greater Iowa Corp.* v. *McLendon*. 378 F. 2d 783, 790 (8th Cir. 1967).

Section 10(b) of the 1934 Act prohibits deception "in connection with the purchase and sale of any security . . . ."

It has long been settled that only purchasers or sellers of securities may invoke the provisions of Section 10(b) of the 1934 Act or Rule 10b-5 of the Commission. *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963 (2d Cir. 1969), *cert. applied for* 38 U.S.L. Week 3454; *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1952), *cert denied*, 343 U. S. 956.

We recognized the rule in *Mader* v. *Armel*, 402 F. 2d 158 (6th Cir. 1968), *cert. denied*, 394 U. S. 930 (1969), and held that a corporate merger involved a sale or purchase within the meaning of the statute. Appellants contend that we extended the statute in *Mader* and that we should extend it further to embrace the present actions or abandon the requirement that in order to recover one must be a purchaser or a seller. In our opinion, adoption of appellants' contention would do violence to the plain language of the statute and Rule. It would open the door to federal purisdiction in claims for damages against corporate directors and officers arising out of breach of their fiduciary duties.

Appropriate remedies to redress said wrongs now exist in the state courts in derivative actions by shareholders, or in the federal courts where diversity jurisdiction and venue exist. In such actions the corporation is a necessary party. If a corporation has a claim for violation of Section 10b, a

shareholder may sue in a derivative capacity. *Birnbaum* v. *Newport Steel Corp., supra.*

We conclude that the District Court was correct in dismissing the suits for lack of jurisdiction. This disposition of the cases makes it unnecessary for us to consider other contentions advanced by the appellants.

Affirmed.

APPENDIX "C."

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of

any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale. May 27, 1933, c. 38, Title I, § 13, 48 Stat. 84; June 6, 1934, c. 404, § 207, 48 Stat. 908.

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments or transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section. May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

§ 78i. Manipulation of security prices

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of sub-

stantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or(C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering

for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(f) The provisions of this section shall not apply to an exempted security. June 6, 1934, c. 404, § 9, 48 Stat. 889.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78n. Proxies

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts

a business in securities through the medium of any such member to give a proxy, consent, or authorization in respect of any security registered on a national securities exchange and carried for the account of a customer in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 14, 48 Stat. 895.

§ 78t. Liabilities of controlling persons

(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

(c) It shall be unlawful for any director or officer of, or any owner of any of the securities issued by, any issuer of any security registered on a national securities exchange without just cause to hinder, delay, or obstruct the making or filing of any document, report, or information, required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title. June 6, 1934, c. 404, § 20, 48 Stat. 899; May 27, 1936, c. 462, § 6, 49 Stat. 1379.

[¶ 23,704] Reg. § 240.10b-5 (Rule 10b-5) Employment of Manipulative and Deceptive Devices

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court Of The United States

October Term, 1970
No. 891

SANDRA LEE SIMMONS SHAW, - Petitioner

vs.

LOUIS E. WOLFSON, ET AL., - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, ARCHIBALD KLEVEN

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a Stockholder May Maintain An Action For Damages Under The Securities Act of 1933, Securities Exchange Act of 1934, and The Rules of The Securities and Exchange Commission Against Individuals Alleged to Have Perpetrated Fraudulent Acts and Manipulation of Corporate Stock to The Alleged Damage of The Corporation Where The Complainant Became a Stockholder Prior to Such Acts and Neither Was a Purchaser Nor Seller of Such Corporate Stock During The Time in Which Such Alleged Acts Were Done or Subsequent Thereto?

2. Whether a Derivative Action on Behalf of The Corporation Is The Proper Remedy Where a Stockholder Alleges Individuals Perpetrated Fraudulent Acts and Manipulation of Corporate Stock to The Alleged Damage of The Corporation?

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970
No. 891

SANDRA LEE SIMMONS SHAW - - *Petitioner*

versus

LOUIS E. WOLFSON,
ARCHIBALD KLEVEN, ET AL. - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, ARCHIBALD KLEVEN

This response is filed on behalf of the defendant-respondent, Archibald Kleven, in the case styled "Sandra Lee Simmons Shaw vs. Louis E. Wolfson, et al." Respondent Kleven is not a party in the companion petition in "Tawanda Simmons vs. Wolfson, et al."

COUNTERSTATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit affirmed an order of the U. S. District Court

for the Western District of Kentucky dismissing petitioner's complaint and amended complaint. Petitioner contends her complaint alleged a claim under provisions of certain sections of the Securities Act of 1933, Securities Exchange Act of 1934, and certain sections of the rules of the Securities and Exchange Commission and the jurisdiction of the United States District Court for the Western District of Kentucky is conferred by these acts.

None of the respondents are residents of Kentucky. Respondents Archibald Kleven, Isadore Sherman, and Joseph Kosow are not now and were not at any time officers or directors of Merritt-Chapman & Scott Corporation (hereinafter referred to as the "Corporation"), but are alleged by the petitioner-plaintiff to have conspired in some instances with those respondents (defendants) who were officers and/or directors of the said Corporation with reference to certain acts on the part of said officers and directors stated by the petitioner to be wrongful. All the other respondents (and the now deceased Rittmaster, represented herein by co-executors of his estate) were at times mentioned in the Complaint directors and/or officers of Merritt-Chapman & Scott Corporation.

Allegations of the Complaint are that respondents-defendants conspired to and did between the year 1961 and the year 1964 certain wrongful acts of commission and omission, alleged to be fraudulent, to the financial detriment of the Corporation, that these acts were in violation of the Securities Act of 1933, the Securities

Exchange Act of 1934, and of the Rules of the Securities and Exchange Commission. Essence of allegations of the complaint are that the respondents who were officers and/or directors conspired with the other named defendants to defraud the Corporation through manipulation of the stock market and causing the Corporation to purchase its own shares of stock from the respondents, or some of them, at a price above the true value of the stock and that the directors caused the Corporation to engage in a number of transactions not in the best interest of the Corporation to finance said purchases of stock from themselves or those in a conspiracy with them, and further that the respondents, officers and/or directors, failed to disclose the alleged conspiracy and wrongdoing to the stockholders. Petitioner also alleged that during all times mentioned in the Complaint she was a shareholder of the Corporation, and that because of damage to the Corporation the value of the shares held by the petitioner was impaired. The only alleged purchase or sale of any security was the Corporation's purchase of its own shares from respondents or some of them.

Petitioner states that she was a shareholder of the Corporation prior to the alleged acts of the defendants and continuously to the time of the action filed herein. Petitioner did not sell or purchase any shares of the Corporation during, or at any time after, the alleged occurrence of any of the acts complained of or in reliance on said acts.

Petitioner instituted this action as a shareholder directly against the respondents, alleging that damage caused to the Corporation by acts of the respondents affected the value of the petitioner's shares. The action was not instituted as a derivative action or in a representative capacity. The Corporation was not made a party.

Petitioner's prayer for relief contained in her Compalint and Amended Complaint states that if the defendants made any profit wrongfully to the detriment of the Corporation, the plaintiff should be awarded her proportionate share of the profit, and that plaintiff should be awarded a sum to compensate her for the difference in value between the present market value of her stock and the value that the stock would have had were it not for alleged fraud by the respondents on and against the Corporation.

All the defendants (respondents) filed motions to dismiss the Complaint. The District Court determined that although the Corporation may have a right of action under the Securities Act of 1933, and/or Securities Exchange Act of 1934, and/or the Rules of the Securities and Exchange Commission, the plaintiff (petitioner) did not state a cause of action under the aforesaid Acts and Rules, and that unless the Court had jurisdiction under said Acts and Rules the Court did not have jurisdiction of the common law conspiracy alleged. The District Court therefore dismissed the Complaint for a lack of jurisdiction. The Court of Appeals for the Sixth Circuit affirmed.

ARGUMENT

1. Whether a Stockholder May Maintain An Action For Damages Under The Securities Act of 1933, Securities Exchange Act of 1934, and The Rules of The Securities and Exchange Commission Against Individuals Alleged to Have Perpetrated Fraudulent Acts and Manipulation of Corporate Stock to The Alleged Damage of The Corporation Where The Complainant Became a Stockholder Prior to Such Acts and Neither Was a Purchaser Nor Seller of Such Corporate Stock During The Time in Which Such Alleged Acts Were Done or Subsequent Thereto?

The substance of the petitioner's contention is that the Courts have abandoned construction of the Securities Acts and the S.E.C. Rule which requires as a condition to recovery under 10(b) of the 1934 Act and 10b-5 of the S.E.C. Rules that a plaintiff must be either a defrauded purchaser or seller. Petitioner further contends that if this construction has not been abandoned it should be abandoned, and if not abandoned, interpretation should be enlarged so that a stockholder in her position be considered a purchaser or seller. Neither the language of the statute nor the Rule leaves any room for such construction. Both clearly state the prohibited acts upon which any action may be predicated must be "in connection with the purchase or sale of any security".

In *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2nd Cir., 1952) cert. denied 343 U.S. 956, 72 S.Ct.

1051, the Court dismissed the complaint predicated on allegations of violation of Section 10(b) of the 1934 Act and Rule 10b-5 of the Commission, holding that an action could not be maintained in absence of allegations that the plaintiff was either a defrauded purchaser or seller of securities. Petitioner here contends that *Birnbaum* is no longer the controlling doctrine. Although several cases coming on before the Second Circuit after *Birnbaum* are interpreted by the petitioner as qualifying the *Birnbaum* rule, no Court has departed from the basic requirement that a cause of action is accorded only to a defrauded purchaser or seller. In *Greenstein* v. *Paul*, 400 F.2d 580 (2nd Cir., 1968), the Second Circuit reiterated its construction of the Acts and Rules, reaffirming *Birnbaum*. Recently, in *Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Co.* v. *Bankers Life & Casualty Co., et al.*, 300 F. Supp. 1083 (D.C., S.D. N.Y., 1969), the District Court faced exactly the same issues as posed in the present case and disposed of these issues in exactly the same way as the Sixth Circuit here. Many of the same cases submitted by petitioner as qualifying the *Birnbaum* rule were distinguished, the District Court at p. 1097 stating: "Indeed in *Greenstein* v. *Paul*, . . . , the Court of Appeals appeared to foreclose any argument respecting the demise of the *Birnbaum* purchaser-seller requirement." Further at p. 1097, in the same opinion, the District Court remarked: "The Court of Appeals has declined to accede to the repeated requests of plaintiffs and *amici curiae*

to enlarge the class of potential plaintiffs in actions for damages arising out of violation of Rule 10b-5 . . . Accordingly, the Court rules that only a defrauded purchaser or seller may sue for damages arising from a violation of section 10(b) of the 1934 Act and S.E.C. Rule 10b-5".

Respondent, while not admitting allegations of the Complaint, submits that if the allegations are true, damage sustained was sustained by the Corporation. If the allegations of the Complaint would sustain a conclusion that the Corporation was a defrauded purchaser of its own stock, the sole action available could not be brought by the stockholder plaintiff, for her own benefit, but would be available to the Corporation or may be asserted for the Corporation in a stockholder's derivative suit. Each of the mentioned cases holds that the Securities Acts were not intended to provide a new cause of action for breach of fiduciary duty, either civil or criminal, on the part of a corporate director or officer. These statutes do not provide for civil claims, although the courts permit a civil recovery where infractions of the Act also result in an identifiable loss on the sale, purchase, or exchange of a security, *Birnbaum* v. *Newport Steel Corp., supra, Cohen* v. *Colvin,* 266 F. Supp. 677 (S.D.N.Y., 1967), *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F.2d 540 (2nd Cir., 1967).

The petitioner relies on cases which actually operate to deny her theory and interpretation of the Acts and Rules. *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627

(2nd Cir., 1967), *Dasho* v. *Susquehanna Corporation*, 380 F.2d 262 (7th Cir., 1967), and *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453 (1969), and *Mader* v. *Armel*, 402 F.2d 158 (6th Cir., 1968), cert. denied 394 U.S. 903, all involve the same issue and point. Each of these cases holds that a holder of stock in one corporation, a party to a merger with another corporation, is a seller when his stock is exchanged in fact for stock in the surviving corporation. The courts in these cases held that the exchange of stock for stock was the same as exchange of stock for money whether the exchange was voluntary, involuntary, or compelled by operation of law. Thus, if there was fraud involved such stockholder was a defrauded purchaser or seller. The positions taken by the courts in these cases were not a departure from the *Birnbaum* rule or from the prior construction of the Acts and S.E.C. Rule. The distinction was pointed out in *Greenstein* v. *Paul, supra*, in which the court dismissed the complaint in a case almost identical to the present one and in which the Second Circuit remarked that if there had been a merger as in *Vine* v. *Beneficial Finance Co.*, supra, a different ruling would have been available. The Second Circuit stated that the sole recourse of the plaintiff was a stockholder's derivative suit, holding further that an individual stockholder who had not sold the stock involved could not maintain an individual action or representative action on behalf of other stockholders for accounting, damages, or other relief. The Second Circuit has re-

stated its adherence to the *Birnbaum* rule in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (2nd Cir., 1969).

In all other cases cited by the plaintiff, the plaintiff has quoted excerpts from dictum in the case, but in each of the cases in which the complaint was not dismissed, the action was instituted by a corporation found to be a defrauded purchaser or seller, or the claim was a derivative action instituted by a stockholder with respect to a corporation alleged to be a defrauded buyer or seller, or was instituted by a stockholder who had actually sold and disposed of stock or who had purchased and received or contracted to buy stock. In not one of these cases cited by the plaintiff was the rule requiring the complaining party to be a defrauded purchaser or seller qualified or abandoned.

In *Hooper* v. *Mountain States Securities Corporation,* 282 F.2d 195 (5th Cir., 1960), the plaintiff was a purchaser of stock issued by the corporation. The plaintiff bought, paid for, and received the stock so that this case is not relevant to the issue in our case. *Fischman* v. *Raytheon Manufacturing Co.,* 188 F.2d 783 (2nd Cir., 1951), was a derivative action, and purchase and sale rule was not an issue. Further, irrespective of the question in *Fischman,* the Second Circuit has long since established the rule that to maintain an action under the Securities Acts and the S.E.C. Rule 10b-5, plaintiff must be a purchaser or seller.

Ruckle v. *Roto American Corporation,* 339 F.2d 24 (2nd Cir., 1964), was a stockholder's derivative action.

The corporation issued securities. The issuance was considered a sale. Plaintiff argues that her position in our present case is the reverse of the situation in the *Ruckle* case, pointing out that in the *Ruckle* case there was an issuance of shares and in our present case there was a repurchase of shares from others than the plaintiff. This does not support the theory of the plaintiff, but rather the theory of the defendants that if an action is permitted, it must be the action of the corporation or a derivative action on its behalf. The corporation was the only purchaser. The plaintiff bought and sold nothing.

O'Neill v. *Maytag,* 339 F.2d 764 (2nd Cir., 1964), was a stockholder's derivative action dismissed upon a ruling that the complaint did not allege a violation of federal law. In *A. T. Brod & Co.* v. *Perlow,* 375 F.2d 393 (2nd Cir., 1967), the Court merely held that a contract to buy stock from a stock broker made the stock broker a seller.

Petitioner cites *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F.2d 540 (2d Cir., 1967), although in this case it was held that persons who had not sold their stock could not bring an action for damage under 10b-5. *Pappas* v. *Moss,* 393 F.2d 865 (3rd Cir., 1968), was a derivative action in which the corporation did sell stock, and the question of whether the corporation was or was not a seller was not involved. There, directors sold corporate stock to themselves.

The position taken by the petitioner under Issue No. 1 rests in entirety on the plaintiff's effort to persuade the Court that under 10(b) of the 1934 Act and

10b-5 of the S.E.C. Rules a plaintiff does not have to be a purchaser or seller, or, in the alternative, that such construction consistently followed by the courts should be abandoned. The courts have not abandoned this interpretation of the Acts and Rule, but rather reiterated the same in every opinion in which the point was involved.

2. Whether a Derivative Action on Behalf of The Corporation Is The Proper Remedy Where a Stockholder Alleges Individuals Perpetrated Fraudulent Acts and Manipulation of Corporate Stock to The Alleged Damage of The Corporation?

Petitioner states that a derivative action would be futile and further that the action would undoubtedly inure to the benefit of the wrongdoers. A stockholder's derivative action is brought by one or more stockholders of a corporation on behalf of the corporation to enforce a corporate right or remedy in cases where the corporation because it is controlled by the wrongdoers or for other reasons fails and/or refuses to take appropriate action for its own protection or for recovery of property or damages to which it is entitled. The gravamen of a derivative action is injury to the corporation or to the whole body of its stock or property. In such actions a demand on the corporate directors or officers to take action to protect corporate property or to recover damages or property is customarily futile. In *Greenstein* v. *Paul, supra,* the Second Circuit in a case very similar to the case at bar held that since the damage was to the corporation,

the proper action was a derivative action, and the stockholder's suit filed for himself alleging violation under the Securities Acts and S.E.C. Rule 10b-5 was dismissed. See also *City Nat'l Bank of Fort Smith* v. *Vanderboom*, 422 F. 2d 221 (8th Cir., 1970).

The statement is made by petitioner that if the Corporation recovered from the respondents, the respondents to the extent of their stock interests would profit by their own wrongs. First, not all respondents are stockholders. Secondly, the injury and damage, if any exists, is to the Corporation, and the Corporation recovers in a derivative action. A recovery on behalf of the Corporation would include a recovery against Louis E. Wolfson. A resulting increase in the value of the assets of the Corporation would inure to all stockholders. It is hard to support the petitioner's reasoning that Wolfson or the other respondents would benefit by the Corporation recovering from Wolfson and the other respondents. At best, he would pay hard cash and receive only an equity interest, subject to control by the Corporation, in only a part of the payment.

Cases cited by petitioner do not support her argument. In *Matheson* v. *Armbrust*, 284 F. 2d 670 (9th Cir., 1960), plaintiff filed an action to cancel his contract to purchase stock. Again the requirement that the plaintiff be a purchaser or seller was adhered to. In *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed. 2d 423 (1964), the Supreme Court held that a merger involved an exchange of stock. The Court

considered only the question of whether Section 27 of the Act authorizes a federal cause of action for recision and damages with respect to a consummated merger. *Stevens* v. *Vowell*, 343 F. 2d 374 (10th Cir., 1965), was an action to recover the purchase price of stock. The *Vine* case involving exchange by reason of merger has been discussed earlier herein.

Petitioner also discusses *Mutual Shares Corp.* v. *Genesco, Inc., supra*, and makes the unwarranted interpretation: "There the claim for damage was denied because of lack of causal connection, not because it was a suit by a particular shareholder."[1] This statement is manifestly inaccurate. In *Mutual Shares Corp., Inc.* v. *Genesco, supra*, the Second Circuit dismissed the claim for damages stating at p. 545: "Moreover, plaintiffs' claim must, of course, find justification in the language of Rule 10b-5, which requires that any alleged damages be 'in connection with the purchase and sale of any security'." The Second Circuit allowed injunctive relief for a continuing fraud, using the language at p. 547: "It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for damages."; but also stated at p. 547: "insofar as the trial court dismissed any claim for damages for a violation of Rule 10b-5, it was correct."

The derivative action benefits all the stockholders, and compensates not only the corporation for loss by way of damages, but prevents a continuing loss of

[1] Petition, p. 20.

value of the corporation's shares from a damaged financial condition. On the other hand, the piece meal recovery of individual shareholders in separate actions tends to lessen the fund from which the corporation might recover and would have the effect of a forced dividend contrary to the consent of other shareholders desiring restoration of the corporation's financial condition.

Other problems of individual recovery for the corporation's loss include questions of multiplicity of suits in the various districts throughout the country, determination of a valuation date for computing loss, if any, and constant expense to the corporation by way of inquiry into its books, records, and transactions by way of discovery.

Clearly, the Securities Acts were not intended to provide relief to shareholders where the alleged acts resulted in damage to the corporation. The relief in such cases is solely by or on behalf of the damaged party, the corporation. Petitioner cites no case which holds otherwise.

CONCLUSION

The two counterstatements of questions presented are facets of the same basic problem. Petitioner acquired her stock before the occurrence of the acts alleged by the complainant to be wrongful and did not thereafter purchase, sell, or otherwise change her position as a stockholder. All the acts alleged to be wrongful were to the damage of the corporation.

Petitioner admits her damage, if any, is by an alleged diminution of the financial condition of the corporation. The corporation is not a party to this action.

Both the statutes under which the action is brought and Rule 10b-5 of the Securities Exchange Commission require as a condition to recovery that the complainant be a purchaser or seller. In every case cited by petitioner the Court adhered to the construction of the Securities Act and Securities and Exchange Commission Rules requiring the plaintiff to be a purchaser or seller as a condition to the jurisdiction of the Court and to recovery on a civil action for damages. Likewise applicable decisions clearly hold a proper remedy is that of a derivative action on behalf of the corporation.

For the foregoing reasons petitioner has failed to present a basis upon which the Writ can be granted. The petitioner refers to no cases from various circuits which are in conflict with applicable decisions of the Supreme Court or contrary to the holdings of other Courts of Appeals. The opinion of the Sixth Circuit herein is consistent with the decisions of the other Courts of Appeals on the same issue, and the question of federal law therein decided is consistent with the wording of the statute, presenting no important question to be settled by this Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 801

TAWANDA R. SIMMONS, - - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

SANDRA LEE SIMMONS SHAW, - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

BRIEF FOR RESPONDENTS, WOLFSON, GERBERT, STAUB, BAKER, HOOVER, KOSOW AND SHERMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

OPINIONS BELOW.

The per curiam Opinion of the United States Court of Appeals for the Sixth Circuit, is printed in Petitioners' "Appendix B" at page 42 and is reported at 428 F. 2d 455. The Opinions of the United States District Court for the Western District of Kentucky (Brooks, J.) are printed in Petitioners' "Appendix A" at pages 23 and 32 and are unreported.

JURISDICTION.

The Petitioners have invoked the authority of this Court under 28 U.S.C. §1254(1). The jurisdiction of the United States District Court was based on 15 U.S.C. §77v and 15 U.S.C. §78aa.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

I. Whether Petitioners, in order to recover under the Securities Acts for an alleged fraud involved in the sale of securities, must be purchasers and sellers of said securities?

II. Whether an action to recover for an alleged fraud on a corporation must be brought by or on behalf of the corporation rather than by each shareholder bringing an individual suit to recover for damage to his individual holding?

STATUTORY PROVISIONS.

The Statutes relied on and set forth by the Petitioners are provisions of the Securities Act of 1933, 15 U.S.C. §77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a, *et seq.*, and being 15 U.S.C. §77l, 15 U.S.C. §77m, 15 U.S.C. §77q, 15 U.S.C. §78l, 15 U.S.C. §78j, 15 U.S.C. §78n and 15 U.S.C. §78t, all of which are set forth in "Appendix C" to Petitioners' Brief at page 45. In addition, 15 U.S.C. §77v and 15 U.S.C. §78aa are involved and are set forth in the Appendix to this brief at pages 13 and 14.

The regulation involved is Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. §240.10b-5, and is set forth in "Appendix C" of Petitioners' brief at page 53.

COUNTER-STATEMENT OF THE CASE.

This brief is filed on behalf of the following named Respondents who were defendants in the actions in the United States District Court: Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover, Joseph Kosow, and Isadore Sherman.

The case as stated in the Petitioners' Brief may be greatly simplified without loss to any material facts. In essence, the dismissed complaints (R. App., pp. 16 and 32) charged that the Respondents conspired to sell stock of the Merritt-Chapman & Scott Corporation to the Merritt-Chapman & Scott Corporation at artificially high prices induced by fraud and manipulation of the market by the Respondents. The Complaints do not allege that either Petitioner (plaintiffs below) purchased, sold, exchanged or in any way parted with or gained possession of any securities after the time the alleged fraud took place. The Petitioners brought separate actions as individual shareholders alleging that damage to the corporation from purchasing its own stock at fraudulently high prices caused damage to the Petitioners' individual holdings. Neither of the Complaints attempted to state any cause of action in a representative or derivative capacity. In fact, the Complaints specifically disclaim any cause of

action on behalf of the corporation or any other shareholders (R. App., pp. 27 and 44).

Because none of the Respondents were residents of Kentucky and none were served with process in the district in which the actions were brought, the District Court could only acquire jurisdiction by the special jurisdictional provisions of the Securities Act of 1933 (15 U.S.C. §77v) or the Securities Exchange Act of 1934. (15 U.S.C. §78aa) The District Court found that no cause of action was stated under the Securities Act of 1933 (15 U.S.C. §77a, *et seq.*) or the Securities Exchange Act of 1934 (15 U.S.C. §78a, *et seq.*) and dismissed the complaints for lack of jurisdiction. (P. App., pp. 23 and 24) The United States Court of Appeals for the Sixth Circuit affirmed in a per curiam opinion. (P. App., p. 42)

The Petitioners charged in their complaints that those Respondents who were directors of the Merritt-Chapman & Scott Corporation conspired with those Respondents who were not directors of the corporation to purchase stock of the corporation and sell it to the corporation at great profit through fraud and manipulation of the market price. The Petitioners also allege that this fraudulent scheme was not disclosed to the shareholders of the corporation in the various reports and statements sent to the shareholders.

The complaints do not allege that either Petitioner was a purchaser or seller of securities in reliance on a fraud. The allegation is that the corporation was the purchaser. The Petitioners admit that they are not purchasers or sellers (Pet. for Cert., p. 10), and argued

that when the corporation is injured their interest in the corporation is injured thus entitling them, as shareholders, to bring individual actions.

The Petitioners seek to recover damages for injury to their shares in the corporation resulting from the damage to the corporation, and seek to recover for themselves from the Respondents a share of the illegal profits allegedly made by the Respondents because of the complained of fraud and manipulation.

ARGUMENT.

Rule 19 of this Court states that a Writ of Certiorari will be granted only where there are special and important reasons therefor. In particular, as applied to this Petition, the character of said reasons is normally limited to cases where one of the following circumstances exists:

I. A conflict between the lower court decisions and decisions of this Court.

II. A conflict of decisions among the Courts of Appeals.

III. A decision involving an important question of Federal law which has not been, but should be, settled by this Court.

IV. A decision involving an important state question in a way conflicting with applicable state law.

I.

There Is No Conflict Between the Lower Court Decisions and the Decisions of this Court.

Petitioners argue that the holding in *J. I. Case Co.* v. *Borak,* 337 U. S. 426 (1964), is in conflict with the decisions of the District Court and the Court of Appeals in this case. Of course, that case dealt with §14(a) of the 1934 Act (15 U.S.C. §78n) and the Petitioners here have not alleged that there was any wrongful solicitation of a proxy. The Petitioners' allegation is that there was a fraudulent sale of stock to the corporation in defiance of §10b (15 U.S.C. §78j) of the 1934 Act. Neither the decisions of the District Court nor the Circuit Court have denied any protection to the purchaser, the Merritt-Chapman & Scott Corporation. There is nothing in the *Borak* case which implies an individual right of action to shareholders of a corporation which has been fraudulently induced to purchase its own stock.

Next the Petitioners argue that the decisions of the District Court and the Court of Appeals are in conflict with the decision of this Court in *Securities & Exchange Commission* v. *National Securities, Inc.,* 393 U. S. 453 (1969). However, in that case it is clear that in order to grant relief under §10b of the 1934 Act, the plaintiff must be a purchaser or seller of the securities involved. This Court in that case did hold that someone who was fraudulently induced to exchange or otherwise transfer securities was a purchaser or seller within the meaning of §10b. The

Court of Appeals for the Sixth Circuit recognized the rule of the *National Securities* case, *supra,* in *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968), *cert. denied* 394 U. S. 903 (1969), but found the rule of that case inapplicable in the instant action because there was no exchange or transfer.

The Petitioners are seeking complete disregard of the purchase and sale rule in order to allow recovery. No decision of the Supreme Court has ever disregarded this statutory phrase, and no conflict of the lower court decisions and the decisions of this Court exists:

II.

There Is No Conflict of Decisions Among the Courts of Appeal.

The decisions among the various Courts of Appeals are uniform in their agreement that in order to recover under Rule 10b the action must be brought by a purchaser or seller of the securities involved. The Court of Appeals in this case did not deny that a corporation has a right to recover damages where it is defrauded in the purchase or sale of stock. Nor is there any denial that if the directors and officers of the corporation refuse to take action to recover the damage a derivative action may be brought by a shareholder. Thus, the following cases cited by the Petitioners as conflicting were derivative actions which held that the proper action by plaintiff was through derivative methods rather than by an individual action: *Fischman* v. *Raytheon Mfg. Co.,* 188 F. 2d 783 (2nd Cir.

1951); *Ruckle* v. *Roto American Corporation,* 339 F. 2d 24 (2nd Cir. 1964); *Dasho* v. *Susquehanna Corporation,* 380 F. 2d 262 (7th Cir. 1967), *cert. denied* 389 U. S. 977 (1967); *Pappas* v. *Moss,* 393 F. 2d 865 (3rd Cir. 1968). Each of these cases holds that where the corporation is the purchaser, seller or issuer of the stock, the action must be brought in the name of the corporation. There is no conflict between these cases and the instant action.

The other cases cited by the Petitioners to indicate inconsistency among other Courts of Appeals with the decisions in this case are cases where the individual involved actually bought, sold, transferred or exchanged stock, or had contracted to do so, and thus had a right of individual action. These cases are in complete conformity with the decision here challenged. *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195 (5th Cir. 1960), *cert. denied* 365 U. S. 814 (1961). *Matheson* v. *Armbrust,* 284 F. 2d 670 (9th Cir. 1960), *cert. denied* 365 U. S. 870 (1961). *Stevens* v. *Vowell,* 343 F. 2d 374 (10th Cir. 1965). *Vine* v. *Beneficial Finance Company,* 374 F. 2d 627 (2nd Cir. 1967), *cert. denied* 389 U. S. 970 (1967). *A. T. Brod & Co.* v. *Perlow,* 375 F. 2d 393 (2nd Cir. 1967). Each of the above cases shows that there is uniformity among the Courts of Appeals, not a conflict.

The Petitioners have failed to note the two most recent cases which demonstrate that there has been no change of position in Court of Appeals for the Second Circuit, where the majority of the cases of this nature are litigated. *Greenstein* v. *Paul,* 400 F. 2d 580 (2nd

Cir. 1968). *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963 (2nd Cir. 1968), *cert. denied* —— U. S. ——, 26 L. Ed. 2d 561, 90 S. Ct. 2199 (June, 1970). These two cases are directly in point on the questions here involved. Also recent decisions in the Fifth and Eighth Circuits have reaffirmed the purchase and sale rule. *Erling* v. *Powell*, CCC FED. SEC. L. REP. ¶92,734 (8th Cir. July, 1970. *Herpich* v. *Wallace*, CCH FED. SEC. L. REP. ¶92,734 (5th Cir. July, 1970). These cases demonstrate clearly that there is no conflict among the circuits in regard to the answers to the two questions presented.

III.

The Decision of the Court of Appeals Does Not Involve an Important Question of Federal Law Which Should Be Settled by This Court.

The Supreme Court has recognized that to recover under §10b of the 1934 Act the claimant must be a purchaser or seller of the security involved. This recognition was made most recently in the *Securities and Exchange Commission* v. *National Securities, Inc.*, *supra*. There it was recognized that the claimant must be a purchaser or seller, and a purchaser or seller was defined as someone who had made an exchange or transfer of stock in reliance on fraud. In the present case, there was no allegation of purchase, sale, exchange or transfer.

The question of federal law involved here was settled by Congress in passing the 1934 Act when it required that recovery under §10b is limited to a pur-

chaser or seller of the security. There is no question left to be settled by the Supreme Court without striking down the entire section of the Act.

IV.

This Decision Does Not Involve an Important State Question Decided in Conflict With Applicable State Law.

If the Court of Appeals had decided in favor of the Petitioners, great violence would have been done to the corporation law of every state in the nation. The Respondents know of no state or federal court which has held that where a corporation is defrauded by its directors an action for damages is properly brought in some name other than that of the corporation. To allow each individual shareholder to bring an individual action for the damage caused the corporation would be to ignore the entity of the corporation. Its right to recover for its damages would be lost or severely limited unless both the corporation and the shareholder were allowed separate recovery from the director for the same wrong. Moreover, the alleged wrongdoers would be forced to defend themselves in each district where a shareholder chose to file suit. If such a situation were allowed to prevail the entire structure of corporate law would be struck down. Nothing could be more conflicting with the applicable laws of every state. The Court of Appeals for the Sixth Circuit clearly recognized this proposition in its decision in the case at bar when it stated that the corporation is a necessary party to this action. Any other finding would lead to corporate chaos.

CONCLUSION.

There are no special or important reasons to grant a Writ of Certiorari in this case. The Supreme Court and the Courts of Appeals have uniformily held and are in total agreement with the decision of the Court of Appeals in the instant case. No court has gone so far as to allow recovery under §10b of the 1934 Securities Exchange Act to a claimant who did not purchase, sell, transfer or exchange the securities involved. Nor has the Supreme Court nor any Court of Appeals ever allowed direct individual recovery by a corporate shareholder in a case where the allegations show that it was the corporation itself which was damaged. Such recovery must be in the name of the corporation.

The Respondents respectfully submit that there is no question presented worthy of review by this Court, and request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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JURISDICTIONAL SECTIONS OF SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934.

§ 77v. Jurisdiction of offenses and suits.

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear bfore the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey

such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. May 27, 1933, c. 38, Title I, § 22, 48 Stat. 86; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 10, 1954, c. 667, Title I, § 11, 68 Stat. 686.

§ 78aa. Jurisdiction of offenses and suits.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations,

may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, § 32(b) 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 6095

Tawanda R. Simmons,
118 Blankenbaker Lane,
Louisville, Kentucky, - - - - - Plaintiff,

v.

Louis E. Wolfson,
6466 North Bay Road,
Miami Beach, Florida,

Elkin B. Gerbert,
Universal Marion Building,
Jacksonville, Florida,

Marshall G. Staub,
99 Park Avenue,
New York, New York,

Robert C. Baker,
c/o American Security & Trust Company,
15th and Pennsylvania Ave., NW,
Washington, D.C.,

Robert W. Hoover,
99 Park Avenue,
New York, New York,

Joseph Kosow,
200 Bold Pate Road,
Newton, Mass.,

Alexander Rittmaster,
860 Channel Road,
Woodmore, Long Island, N.Y., - - Defendants.

COMPLAINT—Filed December 5, 1969.

I. JURISDICTION.

This Court has jurisdiction of this action under the provisions of Section 22 of the Securities Act of 1933 (U.S.C.A., Title 15, Sec. 77v), Section 27 of the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sec. 78aa), and 28 U.S.C. Section 1337, and this Court has pendant jurisdiction of so much of this action as is based upon state law pursuant to the principles of law enunciated by the United States Supreme Court in Hurn v. Cusler, 289 U.S. 238 and United Mine Workers of America v. Gibbs, 383 U.S. 715, 89 S. Ct. 1130, 16 L ed 2d 218, all as hereinafter more particularly appears.

II. THE PARTIES.

A. The Plaintiff.

Plaintiff is an adult resident citizen of Jefferson County, State of Kentucky, which is within the division of this judicial district. She has been during all the times referred to herein and is the owner of certain shares of common stock of a corporation known as Merritt, Chapman & Scott Corporation, which corporation's common stock during all the times referred to herein was listed and registered on and traded on a national stock exchange, namely the New York Stock Exchange, New York, New York.

B. The Defendants.

Plaintiff states, on information and belief, that:

1. The defendants, Louis B. Wolfson and Elkin B. Gerbert, are residents of the State of Florida. The defendants, Marshall G. Staub, Robert W. Hoover and Alexander Rittmaster, are residents of the State of New York. The defendant, Robert C. Baker, is a resident of the District of Columbia. The defendant, Joseph Kosow, is a resident of the State of Massachusetts.

2. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert W. Hoover, Alexander Rittmaster and Robert C. Baker, were during some or all of the times referred to herein, directors and/or officers of the corporation, Merritt, Chapman & Scott Corporation. The defendant, Joseph Kosow, was a part of the scheme and conspiracy with the other defendants as hereinafter set out and described.

3. The defendants, as officers and/or directors of Merritt, Chapman & Scott Corporation, used the mails of the United States Government and various means of interstate commerce to carry out the schemes and conspiracy hereinafter referred to and used such means to issue and deliver proxy statements and financial statements which failed to state facts which kept said statements from being false and misleading to plaintiff.

4. At times relevant to this action the defendants, who are or were officers and/or directors of said corporation, directly or indirectly controlled and were controlling persons of Merritt, Chapman & Scott Corporation within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934.

5. Defendant, Louis E. Wolfson, members of his family, and their associates and companies in which they held a substantial and controlling interest, have, during all the times referred to herein, dominated and controlled the Board of Directors, officers, management, policies, finances, and business affairs of the corporation, Merritt, Chapman & Scott Corporation.

6. The officers and directors of Merritt, Chapman & Scott Corporation did not act independently, but were submissive to the direction, control, orders and instructions of Louis E. Wolfson.

7. The defendants violated the provisions of the Securities Act of 1933, 15 U.S.C.A., Section 77a, et seq. and

the Securities Exchange Act of 1934, 15 U.S.C.A., Section 78a, et seq., the Rules and Regulations of the Security Exchange Commission pursuant thereto and state law, as hereinafter set out.

III. ALLEGATIONS RESPECTING VENUE.

The sale to plaintiff of said securities, the delivery of said securities to plaintiff, the delivery of false and misleading proties, notices, financial statements and various communications took place in Jefferson County, Kentucky, within this division of this judicial district. The defendants controlled Merritt, Chapman & Scott Corporation and arranged for and held corporate meetings of Merritt, Chapman & Scott Corporation in Jefferson County, Kentucky and during part of the times referred to herein, Merritt, Chapman & Scott Corporation controlled a subsidiary corporation whose offices and plants were located in Jefferson County, Kentucky.

IV. COUNT ONE.

1. This action arises under the Securities Act of 1933, the Securities Exchange Act of 1934, and under State law.

2. Plaintiff is and has been since 1959 the owner of 2,600 shares of common stock of Merritt, Chapman & Scott Corporation, which stock during all the times referred to herein was traded on a national security exchange, namely, the New York Stock Exchange, New York, New York. The total number of shares of common stock outstanding is 1,889,693.

3. The defendants, except Joseph Kosow, were, during the times referred to herein, and some still are, officers and/or directors of Merritt, Chapman & Scott Corporation. The defendant, Joseph Kosow, an officer and director of a subsidiary corporation of Merritt, Chapman & Scott Corporation, namely, Industrial Finance Corporation, engaged

in a conspiracy with the other defendants herein, all in violation of the aforesaid statutes and law and to damage of plaintiff.

4. During the period from 1961 to 1964, the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, officers and/or directors and former officers and/or directors of Merritt, Chapman & Scott Corporation, so conducted themselves in their capacity as such and conspired with others, including the defendant, Joseph Kosow, to have Kosow and such other persons acquire and buy common stock of Merritt, Chapman & Scott Corporation with the guarantee that the corporation, Merritt, Chapman & Scott Corporation, would repurchase said stock from them at a profit of approximately 20% to 25%. The defendant, Joseph Kosow, and the other defendants herein, conspired in a scheme whereby Kosow, at the instance of said defendants acquired 738,200 shares of common stock of Merritt, Chapman & Scott Corporation at prices of $8 to $12 per share and the defendants had the corporation repurchase said shares at prices varying from $14 to $19 per share, which profit had been guaranteed to Kosow, thereby paying out of corporate funds a sum in excess of $3,700,000.00 over the price for which the corporation could have acquired said stock directly, and in so doing the defendants unlawfully affected a series of transactions creating an actual or apparent active trading in such securities so as to raise the price of same for the purpose of inducing the purchase by others and used manipulative and deceptive devices and schemes which operated as a fraud and deceit on the corporation and this plaintiff as a stockholder in connection with the purchase of shares by said Kosow and others, and the sale of shares by said Kosow and others to the corporation, and the purchase by the corporation of said shares.

5. Defendant officers and/or directors of the corporation failed to reveal in financial statements and other reports the secret contracts, agreements and guarantees made by them respecting the repurchase agreements and the amount of profit guaranteed and paid to Kosow and other persons with whom they had such secret agreements.

6. Defendant, Kosow, formed a joint venture for the purpose of acquiring stock for resale to the corporation pursuant to this conspiracy with the other defendants, who were officers, directors and insiders, and said defendants failed to reveal such arrangements and such documents, agreements and guarantees to the plaintiff in the various communications sent plaintiff through the mail and thereby omitted to state a material fact necessary in order to make the statements and communications, in the light of the circumstances under which they were made, not misleading, all of which was not known to plaintiff and could not have been known to plaintiff as the defendants had conspired to keep said information secret and not to reveal same even to the Securities and Exchange Commission.

7. Defendants manipulated the market relative to common stock of Merritt, Chapman & Scott Corporation and created an artificial market in order to assist Kosow and his joint venturers, and others with whom they were dealing, in acquiring stock in the corporation, all in violation of the rules and regulations of the New York Stock Exchange and the Securities Exchange Commission and the Securities Act of 1933 and the Securities Exchange Act of 1934 and to the damage of the plaintiff in the value of her investment and return thereon.

8. The defendants conspired to conceal the various actions and transactions among themselves both from the Securities Exchange Commission, from the public and from this plaintiff, and represented to the corporation auditors that said transactions as to purchases by the corporation

were "arms length" transactions when in fact they were part of a conspiracy and fraud, thereby causing the reports and financial statements prepared by or approved by said auditors to be false and misleading.

9. The defendants knowingly caused Merritt, Chapman & Scott Corporation to conceal and omit to disclose and to misrepresent information as to the liability of the corporation to purchase the stock at a price above the then market price and as to payment of unreasonable salaries and compensation and as to losses for bad loans, in the various reports and statements mailed by them, as officers and directors, to this plaintiff through the United States mail, thereby making said communications in the light of the circumstances, false and misleading with respect to material facts and depriving this plaintiff of her right to know the true circumstances of the corporation.

10. The defendants made untrue statements of material facts and omitted to state material facts in various reports, proxies, financial reports and communications to the plaintiff, which were delivered by mail, which would keep said reports from being misleading, and which contained information which was not concurrent and was untimely, and certain of said defendants negligently permitted or aided and abetted the other defendants in doing these acts, with the intent and purpose of having the stockholders including this plaintiff, rely thereon.

11. The defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, caused a profitable business, Devoe and Raynolds Co., Inc., a subsidiary corporation, to be sold to obtain cash to carry on their conspiracy to acquire through others the common stock of Merritt, Chapman & Scott Corporation at prices in excess of what the corporation stock was selling at on the market, and in carrying out said scheme and conspiracy

failed to advise the plaintiff that said funds from said sale would be used to pay excessive profits to persons with whom they conspired to acquire said corporate stock, thereby using said funds to the detriment of this plaintiff.

12. The said devices, schemes, artifices, untrue statements of material facts, omissions to state material facts, acts, practices and courses of conduct of the defendants operated as a fraud and deception on plaintiff, in violation of Rule 10b(5), promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, and were in violation of the said security laws and the laws of the State of Kentucky and the State of New York, all to plaintiff's damage.

13. The defendants, in their secret guarantees to Joseph Kosow, his joint venturers and partners and to others, guaranteed and paid profits from 20% to 23% on the stock acquired and said defendants should be required to pay this plaintiff a comparable profit and defendant, Kosow, should be required to account to plaintiff for her proportionate share of the profits illegally and wrongfully made by reason of the conspiracy and to pay plaintiff the damages she has sustained.

14. Plaintiff states that when she purchased the aforesaid 2,600 shares of Merritt, Chapman & Scott Corporation common stock she relied on, as she had a right to do, the honesty and fair dealing of the company and those who controlled it and plaintiff states that as a result of the conspiracy practiced by the defendants and the fraud and deceit practiced on her and the corporation by the defendants in violation of the said statutes, she has been damaged in her stock interest in said corporation.

V. COUNT TWO.

Plaintiff reiterates the allegations heretofore made and further states:

1. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, who are or were during the transactions referred to, officers and/or directors of Merritt, Chapman & Scott Corporation, carried on various transactions with defendant, Joseph Kosow, and other persons, in illegally purchasing and having purchased the shares of common stock of Merritt, Chapman & Scott Corporation, in accordance with certain secret guarantees, and such actions were ultra vires and illegal and without corporate purpose, and contrary to represented policy of the corporation in diversifying and acquiring profitable enterprises, and said transactions prevented the corporation from engaging in and carrying out said stated policy, all to the damage of the corporation and this plaintiff.

2. The aforesaid defendants who are or were officers and/or directors of the corporation expended the funds of the corporation in acquiring shares of common stock at excessive prices from persons to whom defendants had made secret guarantees of profit, and in paying excessive prices for acquiring certain assets and corporations from persons with whom defendants conspired, and in paying excessive expenses, and in paying excessive insurance premiums to persons with whom they as insiders had a close relationship, and said expenditures constituted unlawful waste, diversion and gifts of assets of the corporation in violation of their fiduciary duties all to the damage of the plaintiff.

3. The said defendants, as officers and/or directors, occupied a fiduciary position with respect to the corporation of which they were officers and/or directors and owed a duty to said corporation, Merritt, Chapman & Scott Corporation, and its shareholders, including this plaintiff, to exercise a high degree of responsibility toward the corporation and this plaintiff's interest therein, and in their actions as here-

inabove set out, breached said fiduciary relationship, causing damage to plaintiff.

4. The said defendants who are or were officers and/or directors of Merritt, Chapman & Scott Corporation caused the corporation to acquire Industrial Finance Corporation, Hub Finance and Congress Finance at prices in excess of their fair and reasonable value, in order to benefit the sellers as against the interests of this plaintiff.

5. The said defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, conspired with defendant, Joseph Kosow, to acquire Industrial Finance Corporation. Said defendants had dealt with Kosow in acquiring shares of common stock of Merritt, Chapman & Scott Corporation and had a secret agreement regarding the repurchase from him of such shares at a profit to him. Through the purchase of Industrial Finance Corporation at a cost of $7,000,000.00 to Merritt, Chapman & Scott Corporation, the defendants conspired to pay defendant Kosow an excessive price for said corporation, said sum paid being approximately $3,000,000.00 above the fair and reasonable market value of said corporation, unjustly rewarding Kosow and depriving this plaintiff of her proportionate interest in said excessive amount of corporation assets.

6. The said defendants caused Merritt, Chapman & Scott Corporation to deposit with the American Security & Trust Company, Washington, D. C., of which the defendant, Robert C. Baker, is president, sums in excess of $8,500,000.00, to be used as additional collateral for personal loans of defendant, Louis E. Wolfson, with the agreement and understanding that said deposits would not draw interest in favor of the Merritt, Chapman & Scott Corporation, when the corporation was and should have been entitled to interest on such deposit, all to the damage of this

plaintiff as a stockholder, and defendants, Robert C. Baker and Louis R. Wolfson, should be required to reimburse plaintiff for her interest therein.

7. Plaintiff states that as a result of the actions and conspiracy of the defendants she was defrauded and suffered damages, all as more particularly set out below. Plaintiff states that the defendants, Louis R. Wolfson, Elkin B. Gorbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Bittmaster, through their actions in the corporation and on the Board of Directors represented that the corporation was buying in its own stock but that a material fact of the conspiracy was that the stock was being bought by the corporation at a price higher than was required and at a profit to persons with whom said defendants conspired, and that by failing to state to plaintiff in their proxies, reports, financial statements and communications these material facts, said defendants made a false representation to the plaintiff. The defendants knew the facts and knowingly made the representations intentionally leaving out of said representations material facts. Plaintiff states that these false representations were made to induce the plaintiff and others to rely thereon and defendants well knew that if they revealed to plaintiff and other stockholders the scheme and conspiracy they were working, the plaintiff and other stockholders would vote against them or sell their shares. Plaintiff states that the defendants as officers and/or directors, occupied a fiduciary position to the corporation and to her as a stockholder and she had a right to rly on the fact that they would reveal to her the true and accurate facts. Plaintiff states that she believed the representations made by the said officers and/or directors that they were buying the stock for the corporation's best interest, and that she had no way to learn or obtain knowledge of the true facts until certain of the defendants were tried in United States District Court of the

Southern District of New York in August, 1938, wherein it was revealed to the public that the defendants conspired with others to buy said stock and to guarantee to them a profit in an amount of approximately 20% to 25%. Plaintiff states that as a result of said fraud she has been damaged by reason of her inability to properly judge the value of said business and said shares and to take appropriate action in shareholders' meetings and to obtain a reasonable return on her investment.

VI. GENERAL ALLEGATIONS.

1. As to the above two Counts, plaintiff states that the corporation is dominated and controlled by defendant, Louis E. Wolfson and his family and persons and corporations which he controls and states that a demand on the corporation to bring an action against the defendant wrongdoers would be futile and useless as said Board of Directors would have to authorize such action and being under the control of defendant Louis E. Wolfson, and said defendant having been a part of said conspiracy herein referred to, said Board of Directors would refuse such action.

2. As to the above Counts, plaintiff states that her action is brought herein as an individual shareholder because any action on behalf of the corporation or by her on behalf of the other shareholders would inure to the benefit of the defendants, and particularly, Louis E. Wolfson, to the extent of their stock interests and such would be futile and unwarranted as they would be profiting from their own wrongs.

VII. DISCOVERY OF FACTS ALLEGED HEREIN.

The conspiracy, scheme, device, and fraud alleged herein was not brought to plaintiff's knowledge and was not discovered by plaintiff until the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staph and Joseph Kosow

were tried in the Southern District of New York on charges of violating the aforesaid Securities statutes in connection with the facts herein referred to on or about August, 1968. The facts alleged were revealed to plaintiff in the trial of the criminal cases and so plaintiff did not discover the facts alleged prior to one year next preceding the filing of this Complaint. Plaintiff further states that she could not have reasonably discovered said facts and said conspiracy prior to said time as said defendants conspired to keep such information secret.

Wherefore, plaintiff demands:

1. That she be awarded damages against the defendants and each of them in an amount equivalent to the percent profit defendants guaranteed and had the Corporation pay to others with whom they conspired, for the period of time she has held said shares, or the sum of $117,883.16.

2. That the defendants be required to account to the plaintiff for her share of such sums as they illegally authorized to be paid by the corporation in carrying out the conspiracy, in acquiring assets at a cost in excess of fair value and in paying out excessive expenses.

3. That she be awarded a sum that would compensate her for the difference in value between the present market value of her stock and the value of said stock had the defendants not perpetrated the conspiracy, waste and fraud on this plaintiff and had used said corporate assets to promote the proper business functions of the corporation.

4. That she be awarded her costs herein and a reasonable allowance for her attorney's fees, and for any and all other legal and equitable relief to which she may appear entitled.

(s) John G. Hicks,
716 Louisville Trust Building,
Louisville, Kentucky,
Attorney for Plaintiff.

DEMAND FOR TRIAL BY JURY.

Plaintiff respectfully demands trial by jury.
This the 5 day of December, 1968.

(s) John G. Hicks,
Attorney for Plaintiff.

State of Kentucky }
County of Jefferson } ss

Tawanda R. Simmons, being duly sworn, deposes and says: that she resides at 118 Blankenbaker Lane, Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing Complaint and knows the contents thereof, and that the same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

(s) Tawanda R. Simmons.

AMENDED COMPLAINT.

Comes the plaintiff, Tawanda R. Simmons, and reiterates and reaffirms the allegations contained in her Complaint herein and for Amendment thereto states as follows:

1. Paragraph III "Allegations Respecting Venue" and Count One, Paragraph 11 are amended to add the following to each of said paragraphs:

The defendants who were Directors of Merritt-Chapman & Scott Corporation caused the Board of Directors of said Corporation to call its annual meeting of stockholders at the Brown Hotel, Louisville, Kentucky, on April 23, 1962, at which meeting the defendants voted to sell 400,000 shares of stock it owned in Devoe and Raynolds Company, Inc., a Subsidiary Corporation with main offices and plant in Louisville, Kentucky, thereby reducing the Corporation's ownership of said Subsidiary from 96% to approximately

65% and that said shares were sold to defendant, Rittmaster and his family, to Sherman and to others at a price of approximately $21.00 per share, which plaintiff believes was below the value of said stock. A copy of said Notice is attached hereto and marked "Exhibit A" to Amended Complaint. The defendants, who are or were Directors of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. and who controlled said Corporation caused the said Subsidiary to hold a special meeting of the shareholders on August 27, 1964, at the Brown Hotel in Louisville, Kentucky, copy of Notice of said meeting being attached hereto as "Exhibit B" to the Amended Complaint. At said meeting the defendants through their control of Merritt-Chapman & Scott Corporation voted the Devoe shares held by Merritt and voted to sell the assets of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. Thereafter the defendants through their control changed the name of Devoe and Raynolds, Inc. to Revday, Inc. and the latter Corporation reacquired the stock previously sold to Rittmaster and his family and Sherman, and others, at a price of approximately $42.00 per share, giving said persons a substantial profit at the expense of the Corporation and placing in their hands funds which plaintiff believes were used for acquiring the stock of Merritt-Chapman & Scott Corporation, pursuant to the conspiracy herein alleged. Certain of said funds from the sale of the assets of Devoe and Raynolds Company, Inc were used to acquire Industrial Finance Company from Merritt-Chapman & Scott Corporation. Thereafter Merritt-Chapman & Scott Corporation merged Revday, Inc. into Merritt. Plaintiff states that these actions and acts which took place in Jefferson County, Kentucky, were part of the conspiracy herein alleged and enabled the defendants to obtain funds to carry out the purchases herein referred to, all being part of the conspiracy herein alleged.

Wherefore, plaintiff demands as in her original Complaint.

John G. Hicks,
716 Louisville Trust Building,
Louisville, Kentucky,
Attorney for Plaintiff.

State of Kentucky }
County of Jefferson } ss

Tawanda R. Simmons, being duly sworn, deposes and says that she resides at 113 Blankenbaker Lane, Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing Amended Complaint and knows the contents thereof, and that same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

(s) Tawanda R. Simmons.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 6258

Sandra Lee Simmons Shaw,
428 Hite Avenue,
Louisville, Kentucky, - - - - Plaintiff,

v.

Louis E. Wolfson,
6466 North Bay Road,
Miami Beach, Florida,
Now at: Florida Federal Prison Camp,
Eglin Air Force Base,
Fort Walton Beach, Florida,

Elkin B. Gerbert,
Universal Marion Building,
Jacksonville, Florida,
Now at: Florida Federal Prison Camp,
Eglin Air Force Base,
Fort Walton Beach, Florida,

Marshall G. Staub,
99 Park Avenue,
New York, New York,

Robert C. Baker,
c/o American Security & Trust Company,
15th and Pennsylvania Ave., N.W.,
Washington, D.C.,

Robert W. Hoover,
99 Park Avenue,
New York, New York,

Joseph Kosow,
200 Bold Pate Road,
Newton, Mass.,

continued on following page.

Isidore Sherman,
927 Lincoln Road,
(or 4925 Collins Avenue),
Miami Beach, Florida,
Archibald Kleven,
209 Washington Street,
Boston, Mass.,
Alexander Rittmaster,
860 Channel Road,
Woodmore, Long Island, N.Y., - - Defendants.

COMPLAINT—Filed June 16, 1969.

I. JURISDICTION.

This Court has jurisdiction of this action under the provisions of Section 22 of the Securities Act of 1933 (U.S.C.A., Title 15, Sec. 77v), Section 27 of the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sec. 78aa), and 28 U.S.C. Section 1337, and this Court has pendant jurisdiction of so much of this action as is based upon state law pursuant to the principles of law enunciated by the United States Supreme Court in Hurn v. Cusler, 289 U.S. 238 and United Mine Workers of American v. Gibbs, 383 U.S. 715, 89 S. Ct. 1130, 16 L ed 2d 218, all as hereinafter more particularly appears.

II. THE PARTIES.

A. The Plaintiff.

Plaintiff is an adult resident citizen of Jefferson County, State of Kentucky, which is within the division of this judicial district. She has been during all the times referred to herein and is the owner of certain shares of common stock of a corporation known as Merritt, Chapman & Scott Corporation, part of which is held in her own name and part of which is held in the name of Robert P. Simmons, as Custodian for Sandra Lee Shaw (now Sandra Lee Simmons

Shaw), of which she is the beneficial owner, which corporation's common stock during all the times referred to herein was listed and registered on and traded on a national stock exchange, namely the New York Stock Exchange, New York, New York.

B. The Defendants.

Plaintiff states, on information and belief, that:

1. The defendants, Louis E. Wolfson, Elkin B. Gerbert and Isidore Sherman, are residents of the State of Florida. The defendants, Marshall G. Staub, Robert W. Hoover and Alexander Rittmaster, are residents of the State of New York. The defendant, Robert C. Baker, is a resident of the District of Columbia. The defendants, Joseph Kosow and Archibald Kleven, are residents of the State of Massachusetts.

2. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert W. Hoover, Alexander Rittmaster and Robert C. Baker, were during some or all of the times referred to herein, directors and/or officers of the corporation, Merritt, Chapman & Scott Corporation. The defendants, Joseph Kosow, Isidore Sherman and Archibald Kleven, were part of the scheme conspiracy with the other defendants as hereinafter set out and described.

3. The defendants, as officers and/or directors of Merritt, Chapman & Scott Corporation, used the mails of the United States Government and various means of interstate commerce to carry out the schemes and conspiracy hereinafter referred to and used such means to issue and deliver proxy statements and financial statements which failed to state facts which kept said statements from being false and misleading to plaintiff.

4. At times relevant to this action the defendants, who are or were officers and/or directors and/or consultants of said corporation, directly or indirectly controlled and were controlling persons of Merritt, Chapman & Scott Corpora-

tion within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934.

5. Defendant, Louis E. Wolfson, members of his family, and their associates and companies in which they held a substantial and controlling interest, have during all the times referred to herein dominated and controlled the Board of Directors, officers, management, policies, finances, and business affairs of the Corporation, Merritt, Chapman & Scott Corporation.

6. The officers and directors of Merritt, Chapman & Scott Corporation did not act independently, but were submissive to the direction, control, orders and instructions of Louis E. Wolfson.

7. The defendants violated the provisions of the Securities Act of 1933, 15 U.S.C.A., Section 77a et seq. and the Securities Exchange Act of 1934, 15 U.S.C.A. Section 78a et seq., the Rules and Regulations of the Security Exchange Commission pursuant thereto and state law, as hereinafter set out.

III. ALLEGATIONS RESPECTING VENUE.

The sale to plaintiff of said securities, the delivery of said securities to plaintiff, the delivery of false and misleading proxies, notices, financial statements and various communications by the United States Mail took place in Jefferson County, Kentucky, within this division of this judicial district. The defendants arranged for and held corporate meetings of Merritt, Chapman & Scott Corporation in Jefferson County, Kentucky and during part of the times referred to herein, Merritt, Chapman & Scott Corporation controlled a subsidiary corporation whose offices and plants were located in Jefferson County, Kentucky.

IV. COUNT ONE.

1. This action arises under the Securities Act of 1933, the Securities Exchange Act of 1934, and under Sate Law.

2. Plaintiff acquired and sold common stock of Merritt, Chapman & Scott Corporation as follows:

50 shares purchased August 3, 1958
1,000 shares purchased July 17, 1959
900 shares purchased August 7, 1959
100 shares purchased August 10, 1959
200 shares sold 1960 and 1961.

Plaintiff now owns 1,850 shares of said stock. Said stock was at all times referred to herein traded on a national security exchange, namely, the New York Stock Exchange, New York, New York. The total number of shares of common stock of said corporation outstanding is 1,889,693.

3. The defendants, except Joseph Kosow, Isidore Sherman and Archibald Kleven, were, during the times referred to herein, and some still are, officers and/or directors of Merritt, Chapman & Scott Corporation. The defendant, Joseph Kosow, an officer and director of a subsidiary corporation of Merritt, Chapman & Scott Corporation, namely, Industrial Finance Corporation, engaged in a conspiracy with other defendants herein, all in violation of the aforesaid statutes and law and to the damage of plaintiff. Isidore Sherman and Archibald Kleven engaged in a conspiracy with the other defendants herein, all in violation of the aforesaid statute and law and to the damage of plaintiff.

4. During the period from 1961 to 1964 the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall C. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, officers and/or directors and former officers and/or directors of Merritt, Chapman & Scot Corporation, so conducted themselves in their capacity as such and conspired with others, including the defendants, Joseph Kosow, Isidore Sherman and Archibald Kleven, to have Kosow, Sherman and Kleven and such other persons acquire and buy common stock of Merritt, Chapman & Scott Corporation with the guarantee that the corporation, Merritt, Chap-

man & Scott Corporation, would repurchase said stock from them at a profit of approximately 20% to 25%. The defendants, Joseph Kosow and the other defendants herein, conspired in a scheme whereby Kosow, at the instance of said defendants acquired 738,200 shares of common stock of Merritt, Chapman & Scott Corporation at prices of $8 to $12 per share and the defendants had the corporation repurchase said shares at prices varying from $14 to $19 per share, which profit had been guaranteed to Kosow, thereby paying out of corporate funds a sum in excess of $3,700,000.00 over the price for which the corporation could have acquired said stock directly, and in so doing the defendants unlawfully effected a series of transactions creating an actual or apparent active trading in such securities so as to raise the price of same for the purpose of inducing the purchase by others and used manipulative and deceptive devices and schemes which operated as a fraud and deceit on the corporation and this plaintiff as a stockholder in connection with the purchases of shares by said Kosow, Sherman and Kleven and others, and the sale of shares by said Kosow, Sherman and Kleven and others to the corporation, and the purchase by the corporation of said shares.

5. Defendant officers and directors of the corporation failed to reveal in financial statements and other reports the secret contracts, agreements and guarantees made by them respecting the repurchase agreements and the amount of profit guaranteed and paid to Kosow, Sherman and Kleven and other persons with whom they had such secret agreements.

6. Defendant, Kosow, formed a joint venture for the purpose of acquiring stock for resale to the corporation pursuant to this conspiracy with the other defendants, who were officers, directors, and insiders, and said defendants failed to reveal such arrangements and such documents,

agreements and guarantees to the plaintiff in the various communications sent plaintiff through the mail and thereby omitted to state a material fact necessary in order to make the statements and communications, in the light of the circumstances under which they were made, not misleading, all of which was not known to plaintiff and could not have been known to plaintiff as the defendants had conspired to keep said information secret and not to reveal same even to the Securities and Exchange Commission.

7. Defendants manipulated the market relative to common stock of Merritt, Chapman & Scott Corporation and created an artificial market in order to assist Kosow, Sherman and Kleven and their venturers, and others with whom they were dealing, in acquiring stock in the corporation, all in violation of the rules and regulations of the New York Stock Exchange and the Securities Exchange Commission and the Securities Act of 1933 and the Securities Exchange Act of 1934 and to the damage of this plaintiff in the value of her investment and return thereon.

8. The defendants conspired to conceal the various actions and transactions among themselves both from the Securities Exchange Commission, from the public and from this plaintiff, and represented to the corporation auditors that said transactions as to the purchase by the corporation were "arms length" transactions when in fact they were part of a conspiracy and fraud, thereby causing the reports and financial statements prepared by or approved by said auditors to be false and misleading but failed to reveal to plaintiff they were false.

9. The defendants knowingly caused Merritt, Chapman & Scott Corporation to conceal and omit to disclose and to misrepresent information as to the liability of the corporation to purchase the stock at a price above the then market price and as to payment of unreasonable salaries and compensation and as to losses for bad loans, in the

various reports and statements mailed by them, as officers and directors, to this plaintiff through the United States mail, thereby making said communications in the light of the circumstances, false and misleading with respect to material facts and depriving this plaintiff of her right to know the true circumstances of the corporation.

10. The defendants made untrue statements of material facts and omitted to state material facts in various reports, proxies, financial reports and communications to the plaintiff, which were delivered by mail, which would keep said reports from being misleading, and which contained information which was not concurrent and was untimely, and certain of said defendants negligently permitted or aided and abetted the other defendants in doing these acts, with the intent and purpose of having the stockholders, including this plaintiff, rely thereon.

11. The defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, caused a profitable business, Devoe and Raynolds Co., Inc., a subsidiary corporation, to be sold to obtain cash to carry on their conspiracy to acquire through others the common stock of Merritt, Chapman & Scott Corporation at prices in excess of what the corporation stock was selling at on the market, and in carrying out said scheme and conspiracy failed to advise the plaintiff that said funds from said sale would be used to pay excessive profits to persons with whom they conspired to acquire said corporate stock, thereby using said funds to the detriment of this plaintiff.

12. The said devices, schemes, artifices, untrue statements of material facts, ommissions to state material facts, acts, practices and courses of conduct of the defendants operated as a fraud and deception on plaintiff, in violation of Rule 10b(5), promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, and were in violation of the said security laws

and the laws of the State of Kentucky and the State of New York, all to plaintiff's damage.

13. The defendants, in their secret guarantees to Joseph Kosow, Isidore Sherman and Archibald Kleven, their joint venturers and partners and to others, guaranteed and paid profits from 20% to 25% on the stock acquired and said defendants should be required to pay this plaintiff a comparable profit and defendants, Kosow, Sherman and Kleven, should be required to account to plaintiff for her proportionate share of the profits illegally and wrongfully made by reason of the conspiracy and to pay plaintiff the damages she has sustained.

14. Plaintiff states that when she purchased the aforesaid 2,050 shares of Merritt, Chapman & Scott Corporation common stock, she relied on, as she had a right to do, the honesty and fair dealing of the company and those who controlled it and plaintiff states that as a result of the conspiracy practiced by the defendants and the fraud and deceit practiced on her and the corporation by the defendants in violation of the said statutes, she has been damaged in her stock interest in said corporation.

V. COUNT TWO.

Plaintiff reiterates the allegations heretofore made and further states:

1. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, who are or were during the transactions referred to, officers and/or directors of Merritt, Chapman & Scott Corporation, carried on various transactions with defendants, Joseph Kosow, Isidore Sherman and Archibald Kleven and other persons, in illegally purchasing and having purchased the shares of common stock of Merritt, Chapman & Scott Corporation, in accordance with certain secret guarantees, and such actions were ultra vires and illegal and without corporate purpose, and con-

trary to represented policy of the corporation in diversifying and acquiring profitable enterprises, and in said transactions prevented the corporation from engaging in and carrying out said stated policy, all to the damage of the corporation and this plaintiff.

2. The aforesaid defendants who are or were officers and/or directors of the corporation expended the funds of the corporation in acquiring shares of common stock at excessive prices from persons to whom defendants had made secret guarantees of profit, and in paying excessive prices for acquiring certain assets and corporations from persons with whom defendants conspired, and in paying excessive insurance premiums to persons with whom they as insiders had a close relationship, said expenditures constituted unlawful waste, diversion and gifts of assets of the corporation in violation of their fiduciary duties all to the damage of the plaintiff.

3. The said defendants, as officers and/or directors, occupied a fiduciary position with respect to the corporation of which they were officers and/or directors and owed a duty to said corporation, Merritt, Chapman & Scott Corporation, and its shareholders, including this plaintiff, to exercise a high degree of responsibility toward the corporation and this plaintiff's interest therein, and in their actions as hereinabove set out, breached said fiduciary relationship, causing damage to plaintiff.

4. The said defendants who are or were officers and/or directors of Merritt, Chapman & Scott Corporation caused the corporation to acquire Industrial Finance Corporation, Hub Finance and Congress Finance at prices in excess of their fair and reasonable value, in order to benefit the sellers as against the interests of this plaintiff.

5. The said defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, conspired with defendant, Joseph Kosow, to acquire Industrial Finance Corporation. Said defendants had dealt with

Kosow in acquiring shares of common stock of Merritt, Chapman & Scott Corporation and had a secret agreement regarding the repurchase from him of such shares at a profit to him. Through the purchase of Industrial Finance Corporation at a cost to Merritt, Chapman & Scott Corporation of $7,000,000.00, the defendants conspired to pay defendant Kosow an excessive price for said corporation, said sum paid being approximately $3,000,000.00 above the fair and reasonable market value of said corporation, unjustly rewarding Kosow and depriving this plaintiff of her proportionate interest in said excessive amount of corporation assets.

6. Plaintiff states that all the defendants, except Kosow, Sherman and Kleven, as officers and directors of Merritt, Chapman & Scott Corporation, brought about the acquisition of Industrial Finance Corporation, Hub Finance Company and Congress Finance Company from defendant, Joseph Kosow and others at an excessive and unreasonable price; that said defendants, through their misrepresentations and concealing of facts brought about the sale of the assets of the subsidiary of Merritt, Chapman & Scott Corporation, known as Devoe and Raynolds Co., Inc., and then changed the name of said subsidiary to Revday, Inc.; that defendants then brought about the sale of Industrial Finance Corporation from Merritt, Chapman & Scott Corporation to Revday, Inc. at a loss to the plaintiff as a shareholder, and subsequently caused and brought about the merger of Revday, Inc. into Merritt, Chapman & Scott Corporation, all to the damage of plaintiff as a stockholder and to the benefit of Kosow.

7. The said defendants caused Merritt, Chapman & Scott Corporation to deposit with the American Security & Trust Company, Washington, D. C., of which defendant, Robert C. Baker, is president, sums in excess of $8,500,000.00, to be used as additional collateral for per-

sonal loans of defendant, Louis E. Wolfson, with the agreement and understanding that said deposits would not draw interest in favor of the Merritt, Chapman & Scott Corporation, when the Corporation was and should have been entitled to interest on such deposit, all to the damage of this plaintiff as a stockholder, and defendants, Robert C. Baker and Louis E. Wolfson, should be required to reimburse plaintiff for her interest thereon.

8. Plaintiff states that as a result of the actions and conspiracy of the defendants she was defrauded and suffered damages, all as more particularly set out below. Plaintiff states that the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, through their actions in the corporation and on the Board of Directors represented that the corporation was buying in its own stock but that a material fact of the conspiracy was that the stock was being bought by the corporation at a price higher than was required and at a profit to persons with whom said defendant conspired, and that by failing to state to plaintiff in their proxies, reports, financial statements and communications these material facts, such defendants made false representations to the plaintiff. The defendants knew the facts and knowingly made the representations intentionally, leaving out of said representations material facts. Plaintiff states that these false representations were made to induce the plaintiff and others to rely thereon and defendants well knew that if they revealed to plaintiff and other stockholders the scheme and conspiracy they were working, the plaintiff and other stockholders would vote against them or sell their shares. Plaintiff states that the defendants, as officers and/or directors, occupied a fiduciary position to the corporation and to her as a stockholder and she had a right to rely on the fact that they would reveal to her the true and accurate facts. Plaintiff

states that she believed the representations made by the said officers and/or directors that they were buying the stock for the corporation's best interest, and that she had no way to learn or obtain knowledge of the true facts until certain of the defendants were tried in United States District Court of the Southern District of New York on or about August, 1968, wherein it was revealed to the public that the defendants conspired with others to buy said stock and to guarantee to them a profit in an amount of approximately 20% to 25%. Plaintiff states that as a result of said fraud she has been damaged by reason of her inability to properly judge the value of said business and said shares and to take appropriate action in shareholders' meetings and to obtain a reasonable return on her investment.

VI. GENERAL ALLEGATIONS.

1. As to the above two Counts plaintiff states that the corporation is dominated and controlled by defendant, Louis E. Wolfson and his family and persons and corporations which he controls and states that a demand on the corporation to bring an action against the defendant wrongdoers would be futile and useless as said Board of Directors would have to authorize such action and being under the control of defendant Louis E. Wolfson, and said defendant having been a part of said conspiracy herein referred to, said Board of Directors would refuse such action.

2. As to the above Counts, plaintiff states that her action is brought herein as an individual shareholder because any action on behalf of the corporation or by her on behalf of the other shareholders would inure to the benefit of the defendants, and particularly, Louis E. Wolfson, to the extent of their stock interest and such would be futile and unwarranted as they would be profiting from their own wrongs.

3. As to the above Counts, plaintiff states that the defendants omitted to disclose to plaintiff and other stock-

holders the scheme or conspiracy described above, which omission was a material fact necessary to make statements and communications furnished plaintiff not misleading, and but for said omission plaintiff would have had knowledge to guide her in handling her investment.

VII. DISCOVERY OF FACTS ALLEGED HEREIN.

The conspiracy, scheme, device, and fraud alleged herein was not brought to plaintiff's knowledge and was not discovered by plaintiff until the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub and Joseph Kosow were tried in the Southern District of New York on charges of violating the aforesaid Securities statutes in connection with the facts herein referred to on or about August, 1968. The facts alleged were revealed to plaintiff in the trial of the criminal cases and so plaintiff did not discover the facts alleged prior to one year next preceding the filing of this Complaint. Plaintiff further states that she could not have reasonably discovered said facts and said conspiracy prior to said time as said defendants conspired to keep such information secret.

Wherefore, plaintiff demands:

1. That she be awarded damages against the defendants and each of them in an amount equivalent to the percent profit defendants guaranteed and had the Corporation pay to others with whom they conspired, for the period of time she has held shares, or the sum of $234,333.88.

2. That the defendants be required to account to the plaintiff for her share of such sums as they illegally authorized to be paid by the corporation in carrying out the conspiracy, in acquiring assets at a cost in excess of fair value and in paying out excessive expenses.

3. That she be awarded a sum that would compensate her for the difference in value between the present market value of her stock and the value of said stock had the de-

fendants not perpetrated the conspiracy, waste and fraud on this plaintiff and had used said corporate assets to promote the proper business functions of the corporation.

4. That she be awarded her costs herein and a reasonable allowance for her attorneys' fees, and for any and all other legal and equitable relief to which she may appear entitled.

(s) John G. Hicks,
716 Louisville Trust Building,
Louisville, Kentucky,
Attorney for Plaintiff.

DEMAND FOR TRIAL BY JURY.

Plaintiff respectfully demands trial by jury.
This the 11 day of June, 1969.

(s) John G. Hicks,
Attorney for Plaintiff.

State of Kentucky }
County of Jefferson } ss.

Sandra Lee Simmons Shaw, being duly sworn, deposes and says. that she resides at 428 Hite Avenue, Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing complaint and knows the contents thereof, and that the same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

Sandra Lee Simmons Shaw.

AMENDED COMPLAINT.

Comes the plaintiff, Sandra Lee Simmons Shaw, and reiterates and reaffirms the allegations contained in her Complaint herein and for Amendment thereto states as follows:

1. Paragraph III "Allegations Respecting Venue" and Count One, Paragraph II are amended to all the following to each of said paragraphs:

The defendants who were Directors of Merritt-Chapman & Scott Corporation caused the Board of Directors of said Corporation to call its annual meeting of stockholders at the Brown Hotel, Louisville, Kentucky, on April 23, 1962, at which meeting the defendants voted to sell 400,000 shares of stock it owned in Devoe and Raynolds Company, Inc., a subsidiary corporation with main offices and plant in Louisville, Kentucky, thereby reducing the corporation's ownership of said subsidiary from 96% to approximately 65% and that said shares were sold to defendant, Rittmaster and his family, to Sherman and to others at a price of approximately $21.00 per share, which plaintiff believes was below the value of said stock. A copy of said notice is attached hereto and marked "Exhibit A" to Amended Complaint. The defendants, who are or were Directors of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. and who controlled said Corporation caused the said Subsidiary to hold a special meeting of the shareholders on August 27, 1964, at the Brown Hotel in Louisville, Kentucky, copy of Notice of said meeting being attached hereto as "Exhibit B" to the Amended Complaint. At said meeting the defendants through their control of Merritt-Chapman & Scott Corporation voted the Devoe shares held by Merritt and voted to sell the assets of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. Thereafter the defendants through their control changed the name of Devoe and

Raynolds, Inc. to Revday, Inc. and the latter corporation reacquired the stock previously sold to Rittmaster and his family and Sherman, and others, at a price of approximately $42.00 per share, giving said persons a substantial profit at the expense of the Corporation and placing in their hands funds which plaintiff believes were used for acquiring the stock of Merritt-Chapman & Scott Corporation, pursuant to the conspiracy herein alleged. Certain of said funds from the sale of the assets of Devoe and Raynolds Company, Inc. were used to acquire Industrial Finance Company from Merritt-Chapman & Scott Corporation, which finance company defendant Kleven controlled. Thereafter Merritt-Chapman & Scott Corporation merged Revday, Inc. into Merritt. Plaintiff states that these actions and acts which took place in Jefferson County, Kentucky, were part of the conspiracy herein alleged and enabled the defendants to obtain funds to carry out the purchases herein referred to, all being part of the conspiracy herein alleged.

Wherefore, plaintiff demands as in her original Complaint.

John G. Hicks
716 Louisville Trust Building
Louisville, Kentucky
583-7655
Attorney for Plaintiff

State of Kentucky }
County of Jefferson } ss

Sandra Lee Simmons Shaw, being duly sworn, deposes and says that she resides at 428 No. Hite Ave., Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing Amended Complaint and knows the

contents thereof, and that same is true to her own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters she believes them to be true.

(s) Sandra Lee Simmons Shaw